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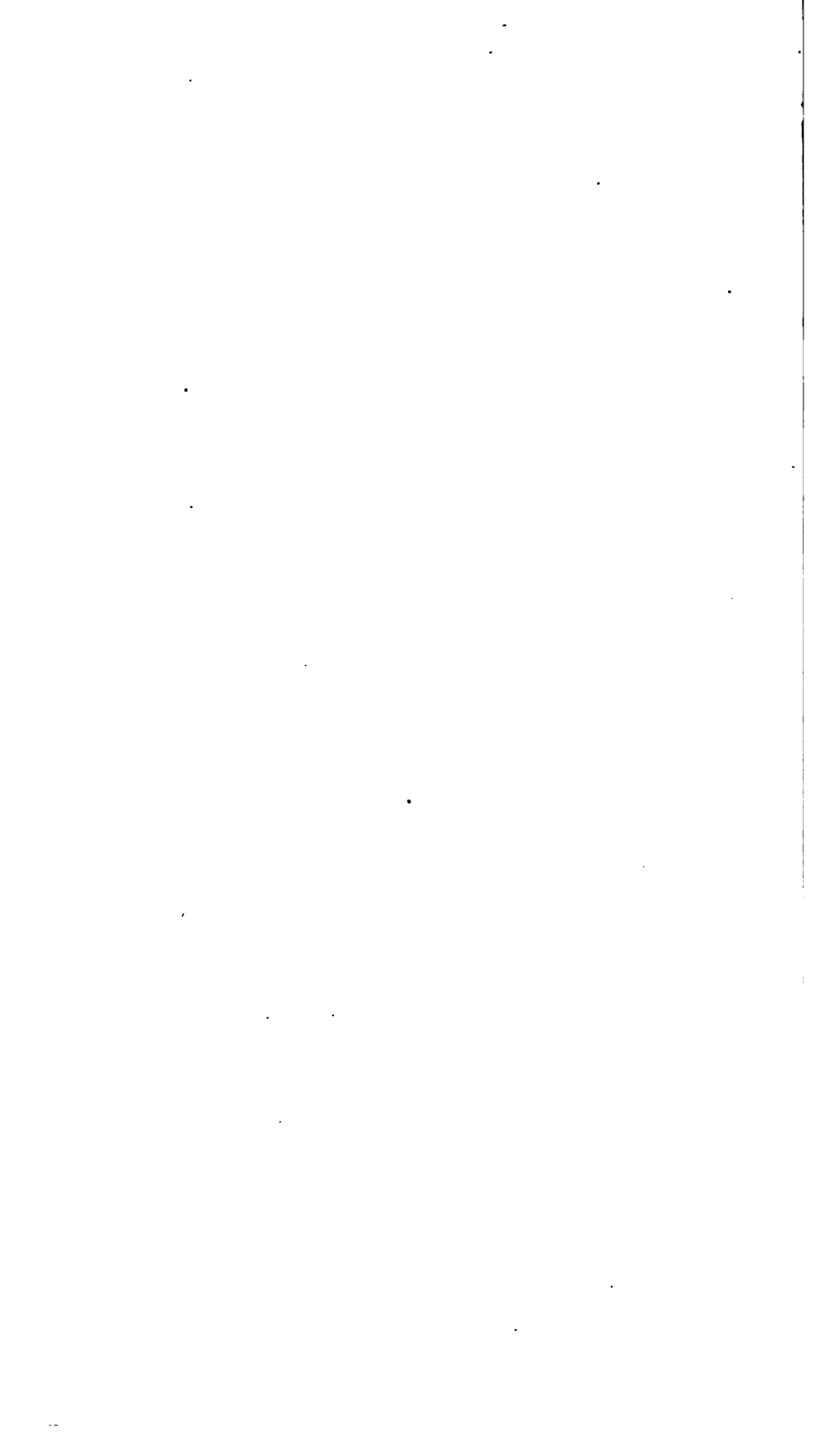
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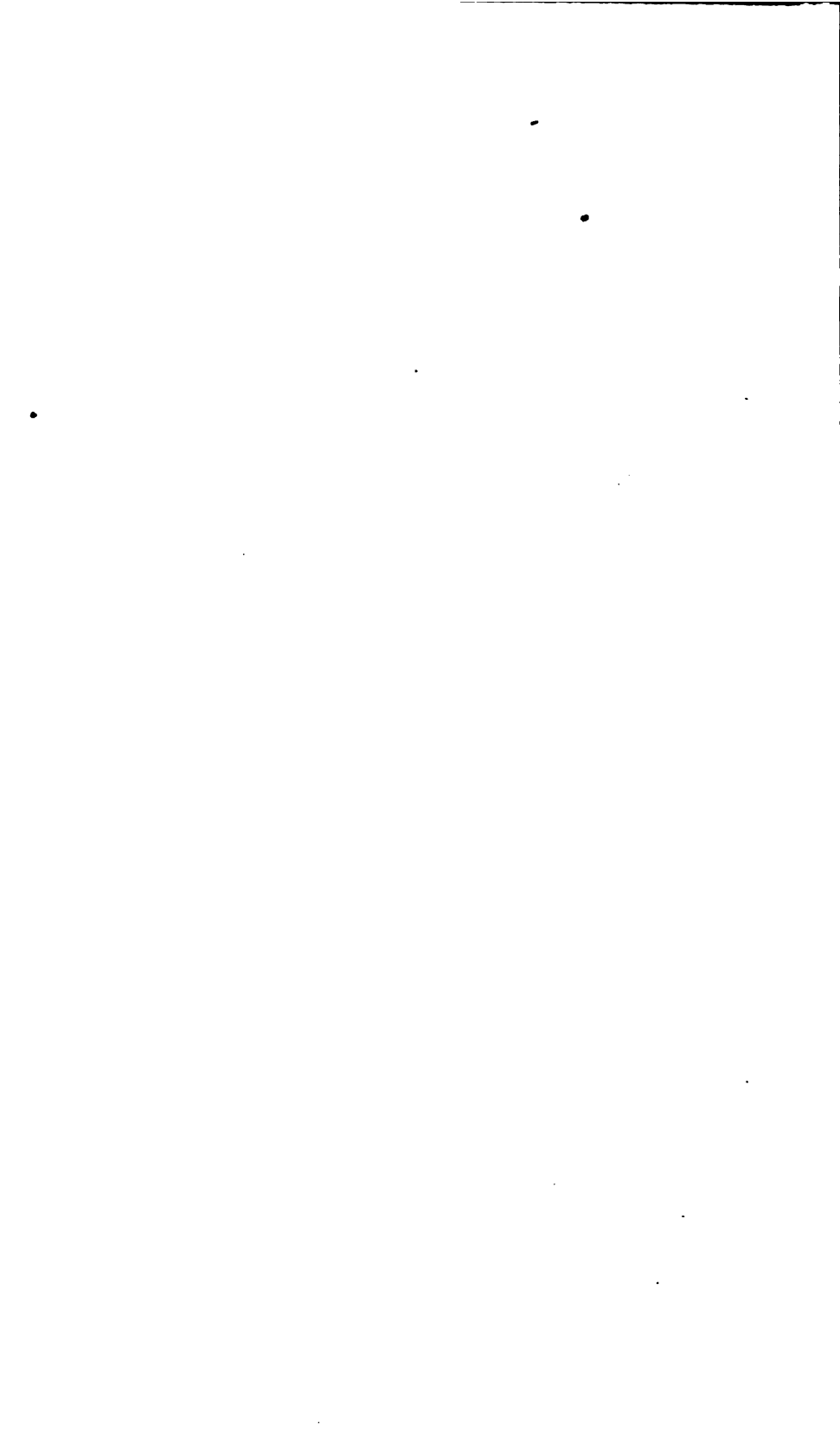
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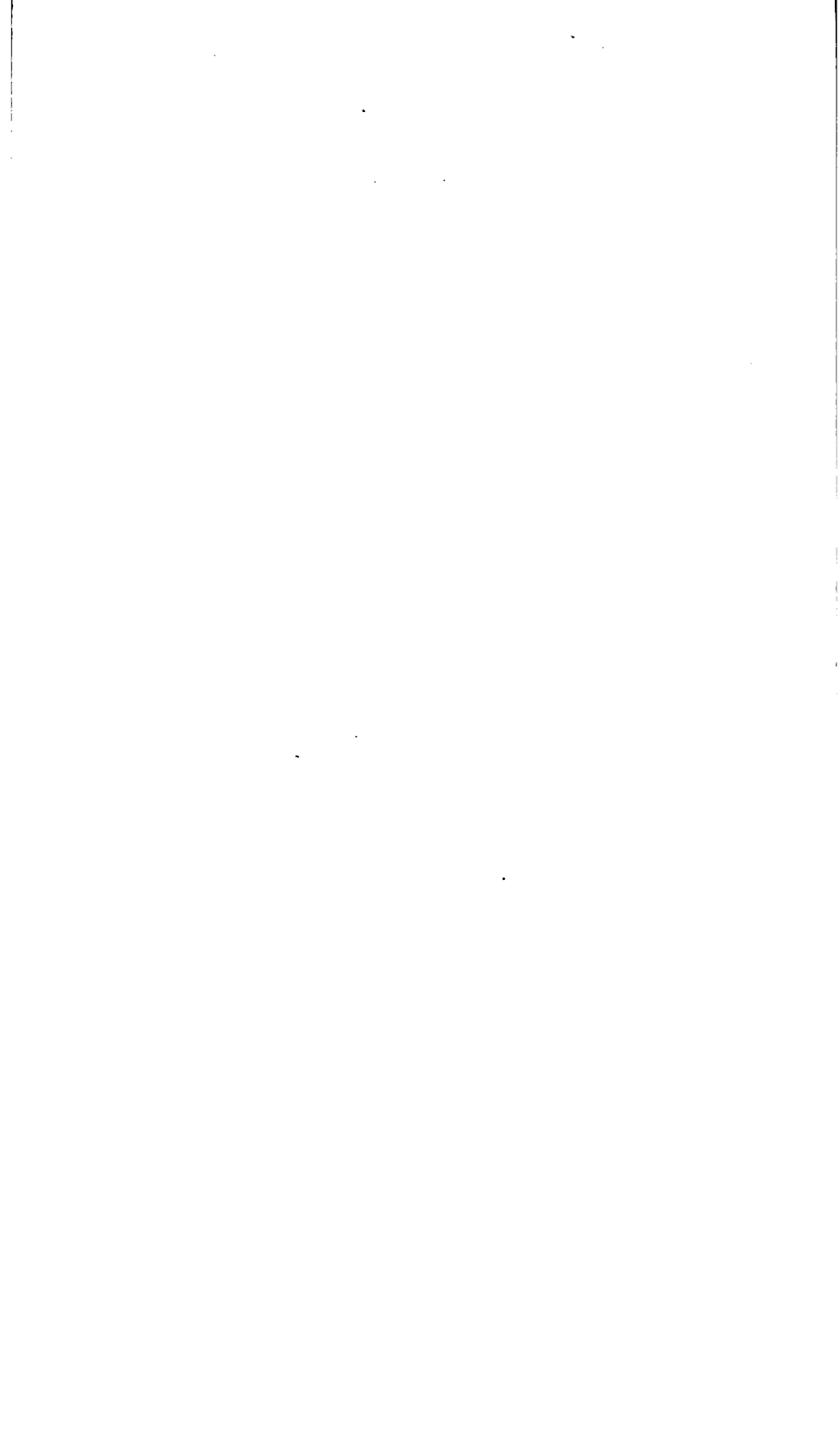












THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1868.

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

COUNSELLOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENTS,"
"COVENANTS AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

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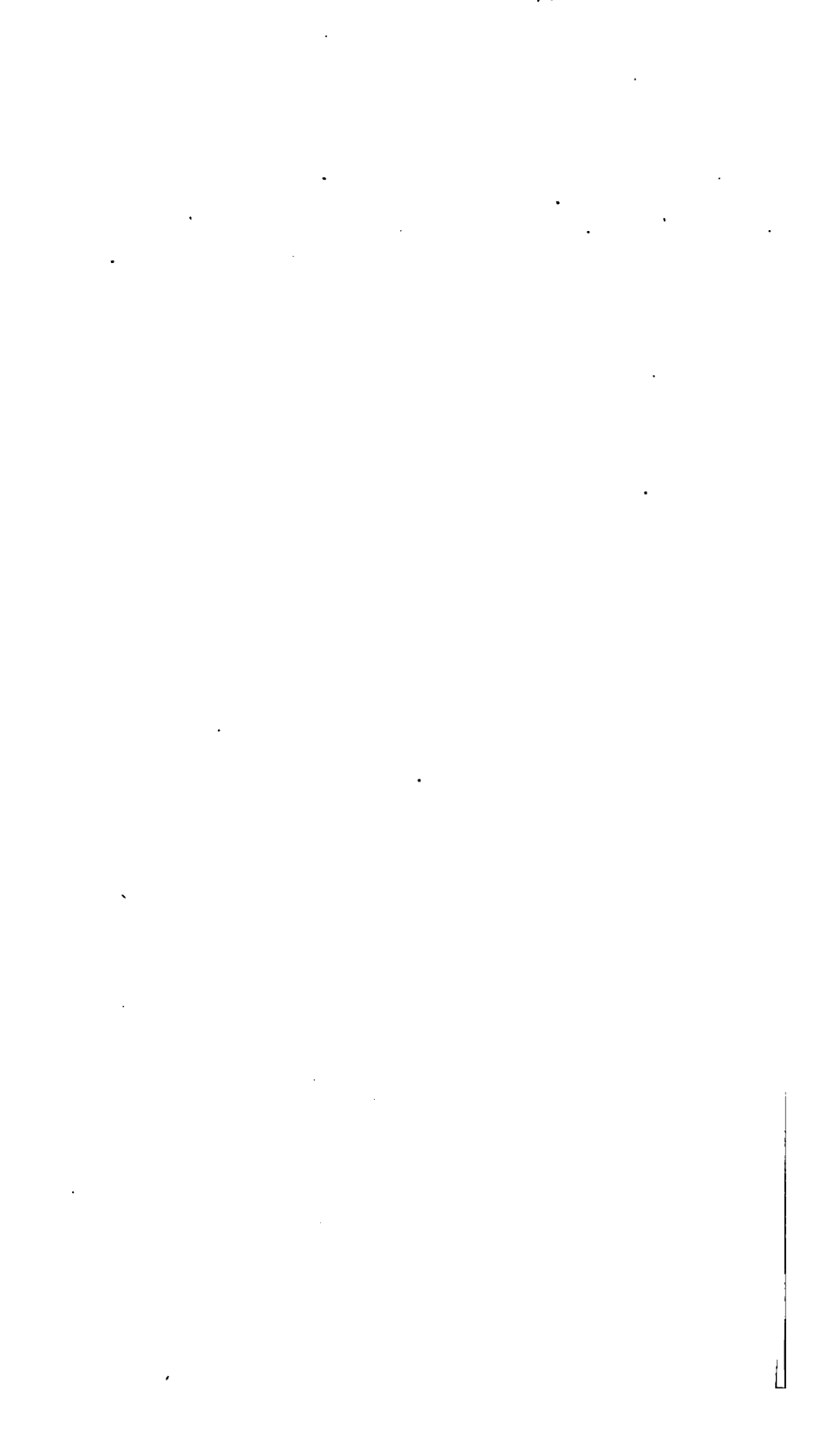
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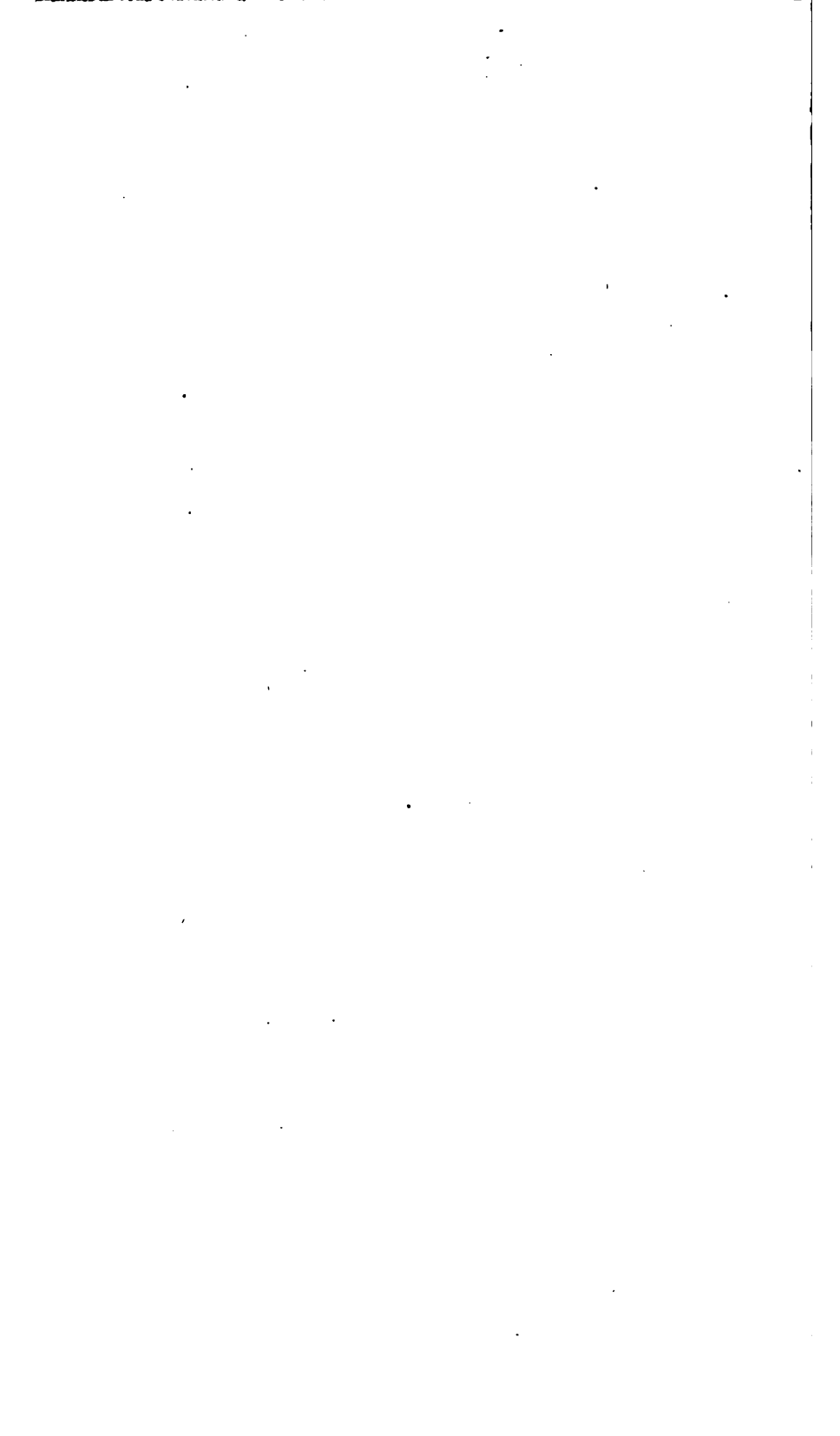
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AMERICAN DECISIONS.

VOL. C.



CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

SMITH v. WASHINGTON GASLIGHT COMPANY.

[81 MARYLAND, 12.]

IN EQUITY, AS AT LAW, SET-OFF IS ONLY ALLOWED where there is a mutuality in the demands, and the amounts are liquidated and certain.

MERE CLAIM OF UNLIQUIDATED AND UNCERTAIN DAMAGES CANNOT BE SET OFF against an undisputed judgment.

TO AUTHORIZE SET-OFF, the debts must be between the parties in their own rights, and must be of the same kind or quality, and be clearly ascertained or liquidated.

SET-OFF, WANT OF JURISDICTION TO ENFORCE. — The plaintiff was located and doing business in Washington City, and recovered judgment in a court of Baltimore. The defendant had a claim for damages growing out of the same transaction. *Held*, that the mere fact that the plaintiff was a non-resident of Baltimore did not give the court of equity of that city jurisdiction to restrain the judgment against the defendant, and to enforce a set-off.

BILL in equity for an injunction to restrain execution on a judgment at law, and praying that so much of the complainant's claim might be set off as would be necessary to extinguish said judgment. The application for an injunction was refused, and the complainant appealed. The material facts appear in the opinion.

Robert J. Brent, for the appellant.

Edward Otis Hinkley, for the appellee.

By Court, **ALVEY, J.** The bill in this case was filed to obtain an injunction to restrain execution on a judgment at law, and to have such judgment extinguished by set-off of alleged damages to which the appellant is supposed to be entitled, as against the appellee.

Without determining whether the appellant's right to the damages alleged is not concluded by the decision of the supreme court of the District of Columbia, recently affirmed on appeal by the supreme court of the United States, in the case of the appellant against the appellee for specific performance, and compensation in damages for partial non-performance of the contract in regard to the gas-tar, we shall inquire whether the damages claimed by the appellant in this case, under the facts disclosed, form the proper subject-matter of set-off to the judgment against him.

Taking the allegations of the bill as true, as we are required to do on this application, the case stated forms no ground for the relief sought.

Set-off in equity is allowed upon the same general principles as at law. There must be mutuality in the demands, and the amounts should be liquidated and certain. And while the practice in equity may be more liberal than at law in respect to mutual credits, set-off can no more be allowed in equity than at law, in cases of demands for uncertain damages, as on breaches of covenant, or for torts.

The principles governing courts of equity upon this subject were very fully expounded by Chancellor Kent, in the case of *Duncan v. Lyon*, 3 Johns. Ch. 359; and in tracing the doctrine, the chancellor says: "The doctrine of set-off was borrowed from the doctrine of compensation in the civil law. Sir Thomas Clarke shows the analogy in many respects on this point between the two systems; and the general rules in the allowance of compensation, or set-off by the civil law, as well as by the law of those countries in which that system is followed, are the same as in the English law. To authorize a set-off, the debts must be between the parties in their own rights, and must be of the same kind or quality, and be clearly ascertained or liquidated. They must be certain and determinate debts: Dig. 16, 2, De Compensationibus, Code, 4, 31, 14. and Code, 5, 21, 1; Ersk. Inst., vol. 2, 525, 527; Pothier Trait. des Oblig., Nos. 587-605."

And Mr. Justice Story states the rule in very much the same terms, and says what appears to be established by all the authorities, that the mere existence of cross-demands will not be sufficient to justify a set-off in equity; and that it is only when the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand that set-off in equity will be allowed: 2 Story's Eq.

Jur., secs. 1436, 1440, 1441; *White v. O'Brien*, 1 Sim. & St. 551; *Rawson v. Samuel*, 1 Craig & P. 172.

The judgment here sought to be enjoined and extinguished by set-off was voluntarily confessed, and there is no question as to the legality of the claim upon which it was founded; and the effort now is to have set off, as against such judgment, an unliquidated and uncertain claim of damages alleged to have accrued by reason of the negligent or fraudulent conduct of the appellee's officers and agents. But it is clear such ground of claim are matters of wrong, sounding in unliquidated damages, and therefore not the proper subject of set-off; for, as was said by Chancellor Kent, in *Murray v. Toland*, 3 Johns. Ch. 575, when speaking of the right to set off a similar unliquidated claim, "such misconduct is properly to be inquired into, in a distinct suit for that purpose; and so it was decided in *Winchester v. Hackley*, 2 Cranch, 342. It is also a subject of legal and not of equitable jurisdiction." And being so, it would be unreasonable to delay the appellee in the collection of its judgment until an action may be brought against it by the appellant to try the question of the right to the damages proposed to be set off. It is true, one judgment may be set off against another, but not a mere claim of unliquidated and uncertain damages on the one side, and an undisputed judgment on the other. For such an instance of set-off, no case has been produced, and we suppose none can be found.

But the appellee is a corporation incorporated by the Congress of the United States, and established in the District of Columbia, where the transactions occurred out of which the supposed claim for damages arose; and the appellant contends that the non-residence of the appellee, and the non-subjection of it to the jurisdiction of the courts of this state, constitute a special equity, or an equitable ground for being protected against the judgment threatened to be executed.

To this proposition, as applicable to the case before us, we cannot assent.

It is not pretended that the appellee is insolvent, nor that redress for any wrong that the appellant has suffered may not be had in the courts of the United States exercising jurisdiction over the District of Columbia. The transactions between the appellant and appellee took place in the District of Columbia, and there is the appropriate place for their investigation. The mere fact that the appellee is located and doing business in the city of Washington does not give a court of

equity here jurisdiction to restrain the judgment against the appellant, and to enforce a set-off. Of that question the case of *Beall v. Brown*, 7 Md. 393, is conclusive; and indeed it was conceded by the appellant that if the doctrine of that case be applied to this, he could have no standing in court.

It was contended, however, that the decision in *Beall v. Brown*, *supra*, asserted a doctrine very much broader than the requirements of the case, and that its authority should be restricted to what the facts required of the court to decide. But, upon examination of the case, we fail to discover that the court decided any proposition that was not fairly and fully presented. Nor is that case at all singular or anomalous, as seemed to be supposed by the appellant's counsel.

In the case of *Murray v. Toland*, 3 Johns. Ch. 569, before referred to, it was insisted that set-off should be allowed, because the complainant might have difficulty in obtaining satisfaction of his demand of a party who resided in Spain, if the latter were permitted to recover judgment, and withdraw the fund in question. But Chancellor Kent, in answer to the application, said: "Such a principle would check all suits at law, and extend the doctrine of set-off to every possible case, if it so happened that the plaintiff at law was not within the jurisdiction of the court. The inconvenience of following a party to his place of residence abroad does not appear to me to be of itself a sufficient ground for departing from the settled doctrines of the court. The court cannot be governed by the mere question of comparative convenience. What would be proper, if the party resided in a country where there was no regular law or justice, or where he was absolutely inaccessible, is not a point before me. A residence at Cadiz is surely not such a case; nor is Spain, with all her infirmity, to be put out of the pale of civilized nations."

Entertaining no doubt of the correctness of the order refusing the injunction, we must affirm it, with costs to the appellee; and as there is no relief obtainable in this case, the bill will be dismissed.

Order affirmed, and bill dismissed.

WHAT CLAIMS MAY BE SUBJECTS OF SET-OFF: *Wallace v. Finnegan*, 90 Am. Dec. 243, and note 245; *Trafford v. Hall*, 82 Id. 539, and cases collected in note 592; *Folsom v. Carli*, 80 Id. 456.

BURDEN OF PROOF IS ON DEFENDANT PLEADING SET-OFF TO SHOW that his claim filed in set-off is due from the plaintiff in the same right with the cause of action declared on: *Lovell v. Nelson*, 87 Am. Dec. 706.

SET-OFF MAY BE BARRED BY LIMITATIONS: *Nolin v. Blackwell*, 86 Am. Dec. 206.

SET-OFF IN EQUITY: See *Milburn v. Gayther*, 50 Am. Dec. 681; *Lockwood v. Beckwith*, 76 Id. 228; *Downs v. Jackson*, 85 Id. 289.

JUDGMENT AS SET-OFF: See *Porter v. Liscom*, 83 Am. Dec. 76; *Skrins v. Simmons*, 91 Id. 771; *Lee v. Lee*, 76 Id. 681. There can be no set-off to judgment of debt not in judgment: *Thorp v. Wegforth*, 93 Id. 789.

FIRST NATIONAL BANK OF BALTIMORE v. JAGGERS.

[81 MARYLAND, 88.]

THAT PARTY IS SUED BY WRONG NAME IS MATTER OF DEFENSE IN ABATEMENT, and is waived by a failure so to plead the misnomer, whether the defendant appears or makes default.

NOTWITHSTANDING MISNOMER OF DEFENDANT, if the writ is served on the party intended to be sued, and he fails to appear and plead in abatement, and suffers judgment by default, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments.

FOURTEENTH SECTION OF UNITED STATES BANKRUPT ACT OF MARCH 2, 1867, REFERS to writs of attachment when used as means and not as final process.

ATTACHMENT AFFECTS ALL PROPERTY AND CREDITS OF DEBTOR IN HANDS OF GARNISHEE, or which may come to his hands at any time after laying the attachment, and before trial.

APPEAL from the superior court of Baltimore City. The material facts appear in the opinion.

William Meade Addison, for the appellant.

S. Teackle Wallis, for the appellee.

By Court, MILLER, J. The appellee obtained a judgment against William B. Lounsbury, on the 12th of March, 1867, for \$1,620.30, and issued an attachment by way of execution therein, which was laid in the hands of the First National Bank of Baltimore, as garnishee, on the 27th of April of the same year. The controversy, as shown by the record, is solely between the attaching creditor and the garnishee. The case was tried in August, 1868, and we shall consider the questions presented by the exceptions, without reference to the order in which they arose at the trial, and without noticing in detail all the prayers offered by the appellant.

The true name of the defendant in the judgment, the party intended to be sued, and upon whom the writ was served, was Wales B., and not William B., Lounsbury, and one point strenuously insisted upon in argument is, that the judgment being

against William, the attachment could not bind the assets or credits of Wales. To the garnishee's plea of *nulla bona* of the said W. B. Lounsbury, the plaintiff replied that William B. Lounsbury, the defendant in the judgment, is otherwise known as Wales B. Lounsbury, and that the said Wales B. Lounsbury, W. B. Lounsbury, and William B. Lounsbury, are one and the same person, and the same who was summoned in the original case, and against whom the judgment was rendered, etc. It was proved that the writ was served upon Wales, but he did not appear, and judgment by default was obtained, and subsequently duly extended by the court. In his application, under the name of Wales, for the benefit of the bankrupt law of the United States, on the 27th of February, 1868, he returned, in his list of debts, the plaintiff as his creditor on this judgment.

There is no doubt that where a party is sued by a wrong name, and he appears to the suit, and does not plead the misnomer in abatement, and judgment is rendered against him in the erroneous name, execution may be issued upon it in that name, and levied upon the property and effects of the real defendant; but there is some conflict in the decisions, whether the same result will follow if he does not appear, and the judgment is obtained by default. The weight of authority, however, is, that this makes no difference, and if the writ is served on the party intended to be sued, and he fails to appear and plead in abatement, and suffers judgment to be obtained by default, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments: *Crawford v. Satchwell*, 2 Strange, 1218; *Smith v. Patten*, 6 Taunt. 115; *Oakley v. Giles*, 3 East, 168; *Smith v. Bowker*, 1 Mass. 76; *Waterbury v. Mather*, 16 Wend. 613; *Lafayette Ins. Co. v. French*, 18 How. 409. The case of *Cole v. Hindson*, 6 Term Rep. 234, was a *distringas* to compel an appearance, and falls within the distinction taken by Lord Tenterden, in *Reeves v. Slater*, 7 Barn. & C. 486, between meane and final process. We cannot, therefore, sustain this position of the appellant. In this connection is to be noticed, also, the objection that there is no proof that Wales and William are the same person. This is based on the assumption that the court had, on motion, ruled out all the testimony on this subject. But the fair and just construction of the motion to exclude the evidence is, that it was confined to that of the two witnesses, Webb and Carey, which was taken subject to excep-

tion. The testimony of the deputy sheriff that he served the writ upon Wales, and the admission of the latter in the proceedings in bankruptcy that this very judgment against William was a judgment against himself, and so treated and considered by him, were offered and went to the jury without objection, were unaffected by the motion, and were amply sufficient to warrant the jury in finding the identity of person.

The appellant's fifth prayer asserts that as Lounsbury applied for the benefit of the bankrupt law on the 27th of February, 1868, the plaintiff could not recover for any funds which came to the hands of the garnishee within four months next preceding that date. This prayer is founded on that clause in the fourteenth section of the bankrupt act which vests all the property of the applicant in the assignee, "although the same is then attached on mesne process as the property of the debtor," and declares the assignment "shall dissolve any such attachment made within four months next preceding the commencement of" the proceedings in bankruptcy. Without attempting to define the meaning of the terms "attachment made," as here used, we are clearly of opinion this clause refers to writs of attachment when used as mesne and not as final process. By our law (Code, art. 10, sec. 30) the plaintiff in a judgment may, "instead of any other execution," issue an attachment thereon against the lands, tenements, goods, chattels, and credits of the defendant. The writ, when so issued, is placed on the same footing, performs the same office, and is governed by the same rules as a *fi. fa.*: *Griffith v. Ætna Fire Ins. Co.*, 7 Md. 102; *Boyd v. Talbott*, 7 Id. 404. This is final and not mesne process. It is true, it originates a new suit between the plaintiff and the garnishee, which may result in a judgment and execution against the latter, but this makes it none the less final process as against the defendant in the original judgment, and such process does not fall within the operation of this clause of the bankrupt act.

It appears from the evidence in the record that Lounsbury was the agent of the Ætna Life Insurance Company, of Hartford, Connecticut, and made deposits in the First National Bank to the credit of that company. The bank account was kept in the name of the company, and Lounsbury drew checks thereon, from time to time, under a power of attorney for that purpose from the company. The plaintiff, supposing or insisting that part of the money so deposited really belonged to

Lounsbury, caused this attachment to be laid in the hands of the bank. When served upon the cashier in April, 1867, he examined the books of the bank, and finding no account in the name of Lounsbury, and considering it could not affect the account of the insurance company, directed the counsel of the bank to return no funds of Lounsbury in the hands of the bank, and continued the company's account without reference to the attachment. In December following, the bank's counsel, who had been informed by the counsel for the plaintiff that the attachment was intended to reach and cover all moneys and credits of Lounsbury in the bank, either in his own name, or as agent, trustee, or in the name of the *Ætna Life Insurance Company*, instructed the cashier to retain funds of the account of this company to cover the attachment, and the cashier immediately notified the company and Lounsbury of the condition of affairs. The latter then drew and remitted to the company a check for \$12,728.40, the whole amount in bank to the company's credit. This check, when presented, the cashier refused to pay, and insisted on retaining \$2,000 to meet the exigencies of this attachment. Afterwards, another check was drawn for \$10,728.40, which the bank paid on the 5th of February, leaving a balance of \$2,000, which, as the cashier testified, is still retained to meet this attachment. No deposit was afterwards made by Lounsbury, but on the 27th of February, the day of his application for the benefit of the bankrupt act, he remitted \$2,000 to the company, which appears as a credit to him as of the 28th of February, in his account with the company on their books; and in his testimony in chief, when examined as a witness for the garnishee, he says this \$2,000, which was the last item in the company's account with him, was for the \$2,000, the balance of the check for \$12,728.40, which the bank would not pay, and appears as a credit to him in the company's account, because they held his check for more than the amount paid by the bank. It is true he afterwards attempted to contradict and explain this statement, and says this \$2,000 which he remitted to the company was for other moneys he actually owed them, and was entirely independent of the \$2,000 retained by the bank, which was still the money of the company, and he had no interest in it whatever. His testimony, however, on this point is very confused and unsatisfactory, and we are of opinion his previous admission in connection with the accounts, books, and other proof in the case afforded a sufficient basis of testimony

on the subject to justify the court in submitting to the jury the finding of the facts stated in the plaintiff's second prayer. The law of this prayer is clearly correct, for, on the facts there stated, the \$2,000 remaining in bank became the money of Lounsbury, and was a credit or debt due by the bank to him, and therefore subject to this attachment, it having so come to the hands of the bank, or thus made such credit or debt before trial.

Under our attachment system, it is the settled law of this state that an attachment affects all property and credits of the debtor in the hands of the garnishee, or which may come to his hands at any time after laying the attachment and before trial; but in the present instance the plaintiff clearly could not, under the attachment against Lounsbury, recover for any funds to the credit of this company which the bank had paid over to them after attachment laid, but before notice that such funds were designed to be affected by the writ. The plaintiff's first prayer announces the former, and the defendant's fourth prayer the latter, of the above propositions, and it is said these two instructions, both of which were granted, were contradictory, and calculated to mislead the jury. If they had been told the one instruction was a modification of the other, no objection could have been taken; and such we think was in this case the substantial effect of granting both. It is to be presumed the jury was possessed of ordinary intelligence, and they must therefore have regarded the instruction granted at the instance of the garnishee as a modification of the general language of the plaintiff's first prayer.

From what has been said, it follows there was no error in the first exception in admitting in evidence the bank account, accompanied as it was with the tender of further proof that a portion of the moneys to the credit of the company in that account belonged in fact to Lounsbury. Nor can we perceive that any possible injury was done the bank by the court's ruling in the second exception in allowing the cashier to state, as part of his narrative and explanatory of his action in the matter, that when the attachment was served on him he considered it to be against W. B. Lounsbury, and to bind anything which he might have in bank, and that he knew by no other name than W. B. Lounsbury the person who made the deposits and drew the checks in the account of the *Ætna Life Insurance Company* with the bank, especially when this testimony was expressly excluded by the court as evidence of the identity of

William B. with Wales B. Lounsbury. And lastly, by no possible rule of construction can any part of these funds thus in bank, which may have been proved to belong to Lounsbury, be regarded as wages or hire of an employee in the hands of his employer so as to be exempt from attachment under section 36, article 10, of the code.

These views dispose of all the points or questions which, upon the broadest construction of the prayers and exceptions, can be said to appear by this record to have been tried and decided by the court below, and we are forbidden by law to decide any others: Act of 1862, c. 154. We therefore forbear the expression of any opinion upon several questions of interest and importance argued at bar. Finding no error in the rulings excepted to, we must affirm the judgment.

Judgment affirmed.

NAME IS MEANS OF IDENTIFICATION; and though defendant may be sued by a wrong name, yet so long as he can be identified as the one against whom the judgment was rendered, it is binding against him: *Parry v. Woodson*, 84 Am. Dec. 51.

MISNOMER IN WRIT MAY BE CORRECTED WHEN: *Crafts v. Sikes*, 64 Am. Dec. 62; *Parry v. Woodson*, 84 Id. 51; compare *Bates v. State Bank*, 46 Id. 293; *Ex parte Cheatham*, 44 Id. 526.

INCORRECT STATEMENT OF CHRISTIAN NAME IN COPY OF CITATION IS CURED by correct statement in copy of petition: *Kirk v. Murphy*, 67 Am. Dec. 640.

WHAT PROPERTY SUBJECT TO GARNISHMENT: See *Mims v. West*, 95 Am. Dec. 379, and cases collected in note 383.

SHERIFFS AND OTHER SIMILAR OFFICERS ARE NOT LIABLE TO GARNISHMENT for moneys in their hands as such officers: *Hill v. Railroad Co.*, 80 Am. Dec. 783, and note 785.

SMITH v. COOKE.

[81 MARYLAND, 174.]

IN ACTIONS UPON PARTNERSHIP CONTRACTS, all partners ought to be made defendants, as a general rule; but the omission to do so can only be taken advantage of by plea in abatement. In default of such plea, a joint contract may be offered in evidence in support of the separate contract declared on.

OBJECTION TO INTERROGATORY AS "LEADING," BEING TO FORM AND MANNER in which the question was put, should be made before the commissioner by whom the evidence is taken.

WHERE FORMER DECLARATIONS OF WITNESS ARE OFFERED FOR PURPOSE OF IMPEACHMENT, the witness must be first asked whether he has ever made such declarations.

REPRESENTATIONS OR DECLARATIONS OF AGENT DO NOT BIND PRINCIPAL, unless made at the time of the contract. They constitute no part of the *res gesta* if made after the contract is consummated, and are not admissible in evidence against the principal.

ASSUMPSIT for goods sold and delivered, brought by the appellee against the appellant. The material facts appear in the opinion.

P. McLaughlin, for the appellant.

Frederick W. Brune, for the appellee.

By Court, ROBINSON, J. The question substantially presented by the first bill of exceptions is, whether, in an action against one partner, it is competent for the plaintiff to offer evidence of a partnership, whereby to charge the defendant with goods sold and delivered to the firm.

As a general rule, it is true that, in actions upon partnership contracts, all the partners ought to be made defendants; but it is also equally well established that the omission to do so can only be taken advantage of by plea in abatement.

In the language of Lord Mansfield, in *Rice v. Shute*, 5 Burr. 2611: "All contracts with partners are joint and several; every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves."

If, however, the plaintiff does not declare jointly, the defect can only be pleaded in abatement; and in default of such a plea, "the joint contract may be offered in evidence in support of the separate contract declared on": Collyer on Partnership, 715.

Accordingly, in *Barry v. Foyles*, 1 Pet. 316, where one partner was sued as the sole contracting party, it was held that evidence of a joint *assumpsit* was admissible whereby to charge the defendant.

In the case now before us, the defendant did not plead in abatement; and the evidence to prove a partnership between the defendant and his son, Samuel J., was therefore clearly admissible.

The objection to interrogatory No. 2½, on the ground that it was "leading," was properly overruled. Being to the form and manner in which the question was put, the objection should have been made before the commissioner. This was decided in *Striker v. Todd*, 13 Serg. & R. 13, and upon the

ground that if made at that time, the question might have been modified to meet the objection.

We concur with the ruling of the court in the fourth bill of exceptions. Evidence had been offered to prove a partnership between the defendant and his son, Samuel, J.; and that the business was carried on in Lemon Street in the name of the son, and at the corner of Howard and Liberty streets in the name of the father.

We think it was competent and proper for the plaintiff to explain why the goods were charged to the father, and the circumstances under which they were delivered.

We find no error in overruling the objection to the fifth interrogatory. The defendant having offered evidence to prove that the cans mentioned in the declaration were sold to Theodore R. Smith, it was competent for the plaintiff, in rebutting this testimony, to prove what was the credit of Theodore, and to explain why he would not have furnished to him the cans in controversy.

The offer on the part of the defendant to prove that Holmes, the foreman and agent of the plaintiff, had repeatedly declared, in the summer of 1863, whilst he was engaged in manufacturing the cans, that he was selling the same to Theodore R. Smith, was properly rejected. The evidence was liable to two objections,—1. If, for the purpose of impeaching the witness Holmes, he should have been asked whether he had ever made such declarations; and 2. Having been made after the alleged contract, they were not binding on the plaintiff.

The representation or declaration of an agent does not bind the principal, unless made at the time of the contract: *Story on Agency*, 135.

They are no part of the *res gestæ*, if made after the contract is consummated, and are not admissible in evidence against the principal.

We see no objection to the plaintiff's first prayer. In order to find for the plaintiff, the jury was instructed that they must believe from the evidence that the cans mentioned in the plaintiff's declaration were furnished and delivered upon the joint order of the defendant and his son, Samuel J.; if furnished on the contract and order of Theodore R. Smith, they were instructed to find for the defendant.

The third prayer of the defendant was properly rejected. It excluded from the jury the evidence of Holmes, as contradict-

ing the witness Samuel J. Smith, who had testified that he never said his father was a member of the firm.

The fourth prayer was fully covered by the plaintiff's first and the defendant's fifth prayer, which were granted. The defendant suffered no injury, therefore, by its rejection.

Finding no error in the rulings of the court below, the judgment will be affirmed.

Judgment affirmed.

OBJECTION OF NON-JOINDER OF PARTNER MUST BE PLEADED: *Zabritsis v. Smith*, 64 Am. Dec. 551.

PRACTICE UPON IMPEACHING WITNESSES, PRIOR CONTRADICTIONARY STATEMENTS: See *Allen v. State*, 73 Am. Dec. 762, and extended note.

DECLARATIONS OF AGENT WHILE IN EXECUTION OF ACT WITHIN SCOPE OF HIS AUTHORITY are admissible against the principal: *Burnside v. Grand Trunk R'y Co.*, 93 Am. Dec. 474, and cases collected in note 478.

THE PRINCIPAL CASE IS CITED to the second point stated in the *syllabus*, in *Jones v. Jones*, 36 Md. 457.

DRYDEN v. HANWAY.

[81 MARYLAND, 254.]

PAROL PROOF OF FACTS AND CIRCUMSTANCES IS ADMISSIBLE IN EQUITY to establish resulting trusts.

- **RESULTING TRUST—DEED ABSOLUTE TREATED AS MORTGAGE.**—D. was the purchaser, in his own name, of a house and lot, but not having the money to pay therefor, H., who was his brother-in-law, advanced the money, and for his security was reported to the orphans' court, by the executors who made the sale, as the purchaser, and took the conveyance in his own name, upon payment of the purchase-money. On a bill filed by D. to have the deed to H. declared to be only a mortgage as between himself and H., *held*, that the facts fully established a resulting trust, which a court of equity would recognize; and that the deed to H. must be treated as a mortgage between the parties.

BILL in equity, seeking to have a deed absolute declared to be a mortgage. The opinion states the case.

L. L. Conrad and Bernard Carter, for the appellant.

H. Clay Dallam, for the appellees.

By Court, STEWART, J. The only material question for us to decide, from the circumstances of this case, is, as to the existence of any such trust or confidence between the appellant and Franklin Hanway, in regard to the house and lot in question, as a court of equity can consider as implied by operation

of law, and not in conflict with the statute of frauds, the plea of which has been interposed by the appellee.

Resulting trusts are saved and excepted by the eighth section of that statute; and that parol proof of facts and circumstances may be admitted in equity to establish such trusts is fully settled.

The answer to the main question involved depends upon the force, effect, and sufficiency of the proof.

If the money advanced by Hanway was on his own account, as a *bona fide* purchaser of the property, the deed, which was taken in his own name, must have correspondent construction, and will vest the title to the property in him, according to the terms expressed therein, and there is no ground for any implied, constructive, or resulting trust.

On the contrary, if Hanway did not in truth become the purchaser of the property, and did not mean to buy the same, but merely to advance or loan the money to Dryden, the appellant, the purchase in equity can only be considered as made by Dryden, and the deed, although taken in Hanway's name, constitutes him but a trustee for Dryden, the *bona fide* purchaser, and is only a security for the payment of the loan: *Boyd v. McLean*, 1 Johns. Ch. 590; *McBurney v. Wellman*, 42 Barb. 402.

The proof in this case very clearly shows that Dryden, the appellant, was the purchaser, in his own name, of the property in question, at the sale made by the executors; but not having the money to pay for the same, Franklin Hanway, who was his brother-in-law, and disposed to aid him, agreed to advance the money for him, and did loan to him the money, and for his security was reported to the orphans' court as the purchaser, and took the conveyance in his own name, upon the payment of the purchase-money. Hanway thus held the legal title, subject to the trust reposed in him.

The manner of holding and occupying the property afterwards is in accordance with this understanding, and is confirmatory of the theory maintained by Dryden, the appellant.

The interest on the debt as such was regularly paid and received, as the receipts filed show, and the taxes were paid, and repairs and improvements made upon the property, by Dryden, as the beneficial proprietor thereof.

Under such circumstances, with abundant evidence of the nature of the transaction, the money loaned by Hanway to Dryden, with the deed conveying to Hanway the legal title to

the property, to secure its payment, must be treated as a mortgage between the parties.

A resulting trust is fully established, which a court of equity will recognize; upon the payment of the amount loaned by Hanway to Dryden, with the arrears of interest thereon, within such reasonable time as may be prescribed by the court below, the property must be discharged from the lien of the same, and be conveyed to the appellant, Dryden, by a trustee to be appointed by the court for that purpose.

The decree below will be reversed, and the cause remanded for further proceedings in conformity with this view.

Decree reversed, and cause remanded.

PAROL EVIDENCE TO SHOW THAT CONVEYANCE, ABSOLUTE IN FORM, WAS INTENDED AS MORTGAGE: See *Johnson v. Sherman*, 76 Am. Dec. 481, and note 488; *Ryan v. Dox*, 90 Id. 696, and cases collected in note 708.

DOCTRINE OF RESULTING TRUST, UPON WHAT BASED: *Dickinson v. Davis*, 80 Am. Dec. 202.

HUNTT v. TOWNSHEND.

[31 MARYLAND, 336.]

CONDUCT OF TRUSTEES IN MANAGEMENT AND DISPOSITION OF TRUST PROPERTY must be regulated and controlled by the provisions and conditions of the deed of trust. And trustees accepting the trust, upon the terms and conditions creating it, have no power to alter, change, or dispense with those terms and conditions.

WHERE DEED OF TRUST MINUTELY PRESCRIBES the circumstances under which, and the manner in which, the trustees may dispose of the trust property, they are not at liberty to dispose of it in any other manner. If they voluntarily confess judgment, contrary to the provisions of the trust deed, such judgment is not a lien upon the trust property, and can only bind the individual property of the parties confessing it.

THE opinion states the case.

A. B. Hagner and A. Randall, for the appellants.

A. W. Wilson, and Jones, attorney-general, for the appellees.

By Court, GRASON, J. This appeal is taken from a decree of the circuit court for Prince George's County, sitting in equity, by which the injunction was dissolved, and the bill of complaint was dismissed. The injunction had been granted to enjoin the further execution of a judgment at law, confessed in the circuit court for Prince George's County, in favor of the

plaintiff therein, the present appellee, by James H. Griffin, Thomas T. Munroe, and William B. Townshend, who are described in the judgment as "survivors and successors of John H. Munroe, Presley N. Athey, Joseph R. Hunt, and Jeremiah Townshend, trustees of McKendree Church, of the Methodist Episcopal Church of the United States of America."

The execution had been levied upon the church and the lot upon which it stood.

The record presents several questions which we do not consider it necessary to decide, and among those is the question, Who are the rightful and lawful trustees of the said church? We shall consider but two points, — 1. Have the complainants the right to maintain this suit; and 2. Is the judgment confessed by the parties thereto binding upon McKendree Church? The bill in this case was filed by the appellants, representing themselves to be trustees and members of McKendree Church; and it sufficiently appears in the bill that they sue for themselves, as well as for other members of said church, "using it and worshiping therein." Joseph R. Hunt, one of the complainants, is the only survivor of the original trustees appointed by the deed, and to whom the property taken in execution was conveyed. There can be no doubt, therefore, that the bill shows such an interest in the complainants and the others in whose behalf they also sue in the property levied upon, as to entitle them to prosecute this suit.

The provisions and conditions of the deed of trust make the law, by which the conduct of the trustees, in the management and disposition of the trust property, must be regulated and controlled. Trustees accepting the trust upon the terms and conditions of the deed creating the trust have no power to alter, change, or dispense with those terms and conditions: *Dolan v. Mayor and City Council of Baltimore*, 4 Gill, 405, 406. The deed of trust by which this property was conveyed to the trustees therein named provides "that if the said trustees, or any of them, or their successors, have advanced, or shall advance, any sum or sums of money, or are or shall be responsible for any sum or sums of money, on account of said premises, and they, the said trustees or their successors, be obliged to pay the said sum or sums of money, they, or a majority of them, shall be authorized to raise the said sum or sums of money by mortgage on the said premises, or by selling the said premises, after notice given by the pastor or preacher having the oversight of the congregation attending divine

service on said premises, if the money due be not paid to said trustees or their successors within one year after such notice is given." The deed then goes on to provide what disposition shall be made of the balance of the purchase-money after the debts, for the payment of which the sale has been made, shall have been satisfied. The deed having thus minutely and particularly prescribed the circumstances under which, and the manner in which, the trustees should have authority to sell the trust property, they have no power nor authority to dispose of it under any other circumstances, or in any other manner. If the trustees cannot mortgage the trust property under any other circumstances than those prescribed in the deed of trust, and are prohibited from selling except in strict accordance with the terms of the deed, have they nevertheless the power voluntarily to go into court and confess a judgment binding upon the property, thus creating by their own voluntary act, a lien upon it, under which it may be sold, and those, for whose use it was designed, be deprived of all benefit of it? Such a proceeding is a breach of trust, and a judgment so confessed is not a lien upon the trust property, which cannot be levied upon or sold under an execution issued upon it. Such a judgment can only bind the individual property of the parties who confess it. The injunction ought not, therefore, to have been dissolved, but ought to have been made perpetual.

The decree of the court below must therefore be reversed, and the cause remanded, so that a decree may be passed in accordance with this opinion.

Decree reversed, and cause remanded.

STEWART, J., dissented.

CONVEYANCE BY TRUSTEE, AND EFFECT OF: See *Gale v. Menzies*, 64 Am. Dec. 197, and extended note 199.

TRUSTEE'S OBLIGATIONS AND LIABILITIES WITH REGARD TO INVESTMENTS: See *Campbell v. Miller*, 95 Am. Dec. 389, and cases collected in note 392.

TRUSTEE UNDER TRUST DEED MAY EMPLOY AGENT TO PERFORM MECHANICAL PARTS OF SALE: *Gillespie v. Smith*, 81 Am. Dec. 328.

TRUSTEE'S POWER TO SELL: *Paul v. Fulton*, 82 Am. Dec. 124.

TRUSTEE UNDER DEED OF TRUST HAS NO POWER TO IMPOSE NEW TERMS or conditions, or to alter or vary those contained in the deed: *Cassell v. Ross*, 85 Am. Dec. 270.

THE PRINCIPAL CASE IS CITED to the point that a trust, with a power of sale "out and out," will not authorize a mortgage; and a trust for sale, with nothing to negative the settler's intention to convert the estate, absolutely, will not authorize the trustee to execute a mortgage, in *Tyson v. Latrobe*, 42 Md. 337.

MYER v. GRAFFLIN.

[31 MARYLAND, 350.]

TO ASCERTAIN WHETHER UNDERTAKING TO PAY DEBT OF ANOTHER BE COLLATERAL OR ORIGINAL, the point of inquiry is, To whom was the credit given at the time of the sale and delivery of the goods? And this is a question for the jury.

FACT THAT PARTY OBTAINING GOODS IS DEBITED WITH THEM ON BOOKS OF VENDOR is not conclusive evidence that credit was given to him, but only a strong circumstance to be submitted, with all the other evidence in the cause, to the jury.

ASSUMPSIT for goods sold and delivered. The defendant pleaded "that he never was indebted as alleged," and "that he did not promise as alleged." The plaintiffs, Myer & Co., proved upon the trial that Spear and Pratt, who were unknown to the plaintiffs, called at their store and desired to buy goods upon credit; that the plaintiffs declined to let them have the goods unless they gave the name of a responsible party in the city of Baltimore who would be responsible for the payment of them; that the name of the defendant, Grafflin was then given as paymaster, Spear stating that he and Pratt were in the employment of the defendant; whereupon the plaintiffs delivered the goods to Spear and Pratt, taking from them in settlement a draft drawn by them upon the defendant for the amount of the goods then sold and delivered, which draft was accepted and duly paid by the defendant at its maturity; soon afterwards, Spear and Pratt bought other goods of the plaintiffs, and gave in settlement a draft upon the defendant for the amount, which was duly accepted by him, and paid at its maturity in bank; that subsequently the plaintiffs presented to the defendant another draft drawn by Spear and Pratt upon him, and given to the plaintiffs in settlement for other goods furnished to Spear and Pratt; that the defendant demurred somewhat to accepting this last draft, but finally accepted it, and it was paid at maturity in bank. The plaintiffs further proved that, subsequently, they told the defendant that Spear and Pratt wanted more goods, which they would not let them have unless the defendant would be responsible for them; that the defendant replied to them to let the goods go, — that it was all right, — that he had demurred to accepting the last draft because he did not then understand it, but that he knew all about this bill, and that the plaintiffs could let the goods go; that upon the faith of this conversation the plaintiffs delivered the goods to Spear and Pratt,

amounting in price to the sum sought to be recovered in this action. The goods last mentioned were debited to Spear and Pratt upon the books of the plaintiffs, as all the previous sales had been; but that the goods were sold to the defendant, and to him the plaintiffs looked alone for payment. The defendant asked the court to instruct the jury "that the evidence in this case is not legally sufficient to charge the defendant as upon an original undertaking, not collateral to the liability of Spear, for the goods sold and delivered to him." The court so instructed the jury, withdrawing from them the consideration of all the facts in the case. The verdict and judgment being for the defendant, the plaintiffs appealed.

William C. Schley and St. George W. Teackle, for the appellants.

William Pinkney Whyte, for the appellee.

By Court, MILLER, J. There is no difficulty about the construction of the part of the fourth section of the statute of frauds relied on by the appellee as a defense to this action. That is clearly settled by the case of *Elder v. Warfield*, 7 Har. & J. 391, which has been followed and approved by all the subsequent decisions in this state upon the same subject. To ascertain whether the defendant's undertaking was collateral or original, the point of inquiry in the case before us is, to whom was the credit given at the time of the sale and delivery of the goods; and we are clearly of opinion the court below erred in taking from the jury the determination of this question by granting the defendant's first prayer. The refusal of a similar instruction in *Elder v. Warfield*, *supra*, was affirmed by this court upon evidence less favorable to the plaintiff, and the defendant's counsel has conceded the granting of his prayer would have been erroneous, but for the decision in *Cropper v. Pittman*, 13 Md. 190. There is not only no conflict between the two decisions, but the latter expressly recognizes and adopts the former. The doctrine of both, as well as of *Connolly v. Kettlewell*, 1 Gill, 260, is, that where credit is given to one on the promise of a third party "to see him paid," the undertaking of the latter is collateral, and void under the statute, unless in writing; and where the party undertaken for is originally liable on the same contract, the promise to answer for that liability is a collateral, and not an original, undertaking, unless there is a new and superadded consideration mov-

ing between the party promising and him to whom the promise is made. But it is conceded in *Cropper v. Pittman*, *supra*, that it does not follow in every case where the words "I will see the bill paid" are used, they necessarily import a collateral understanding. If accompanied by other words or facts sufficient to authorize a jury to find from all the evidence that credit was given to the party using them, and the jury so find, he will be held responsible. It is decided in *Cropper v. Pittman*, *supra*, following in this respect *Connolly v. Kettlewell*, *supra*, that such words standing alone import a collateral undertaking, and the jury must be so instructed as to their legal effect. In that case the defendant introduced his brother to the plaintiff, saying his brother intended to go into business in Virginia, and wished to purchase a bill of goods, and said "he would see the bill paid." The brother then selected a bill of goods, and they were put aside; but before delivery, the plaintiff's clerk went to the defendant, and asked him if he would accept a draft for the bill if the plaintiff would give two months' extra time.

This proposition the defendant declined, but said he would see the bill paid, as he expected his brother would consign produce to him in three months, and he would appropriate the amount to pay the bill, and again remarked "he would see the bill paid if his brother purchased the goods of the plaintiff." When this conversation was reported to the plaintiff, the goods were delivered to the brother, and charged to him on the plaintiff's books; and there was also proof tending to show the plaintiff at the time took the brother's bond or note for the bill of goods thus purchased. Upon this evidence, the court say they could not doubt that the brother was liable for the goods delivered to him, or that the plaintiff considered him as debtor for them; that they were selected by and charged to him, and there was nothing to show he was not credited by the plaintiff. Hence, the case was such that the court could see the evidence was not legally sufficient to charge the defendant as upon an original undertaking not collateral to the liability of another, and therefore said there was no propriety in sending the parties to a jury. But in the present case, the evidence is essentially different. According to the testimony of Myer, one of the plaintiffs, there is positive proof that the plaintiffs, in the sale of the goods in question, looked alone to the defendant for payment, and that the goods were in fact sold to him. From all the testimony of this wit-

ness, if believed by them, the jury were at liberty to find the credit at the time of sale and delivery of the goods was given to the defendant, and that there was no credit given to, or original liability on the part of, either Spear or Pratt therefor. The fact that Spear was debited with the goods on the books of the plaintiffs is not, as was decided in *Elder v. Warfield*, *supra*, conclusive evidence that the credit was given to him, but only a circumstance, strong, it is true, to be submitted with all the other evidence in the cause to the jury.

Judgment reversed, and *procedendo* awarded.

WHEN PROMISE TO ANSWER FOR DEBT, ETC., OF ANOTHER IS, OR IS NOT, WITHIN STATUTE OF FRAUDS: *Packer v. Benton*, 95 Am. Dec. 246, and extended note on subject 251-263.

NORTHERN CENTRAL RAILWAY CO. v. STATE.

[31 MARYLAND, 357.]

WHERE EVIDENCE IS CONFLICTING AS TO CONCURRENT NEGLIGENCE OF PARTY INJURED, the jury may, in connection with all the facts and circumstances of the case, infer the absence of fault from the known disposition of men to avoid injury to themselves.

ACTION WILL LIE WHERE IT APPEARS, either that the party inflicting the injury might, by a proper degree of caution, have avoided the consequences of the injured party's neglect, or that the latter could not, by ordinary care, have avoided the consequences of the defendant's negligence.

WHERE IT APPEARS THAT NEGLIGENCE OF BOTH PARTIES WAS CONCURRENT, and co-operated to produce the injury complained of, no action will lie, the law regarding the causes as equally proximate to the effect produced, and not, therefore, susceptible of apportionment.

IN ORDER THAT PERSON MAY EXERCISE PROPER CARE IN AVOIDING CONSEQUENCES of his own or another's negligence, it is necessary that he have time to become aware of the conduct and situation of the latter.

INSTRUCTION TO JURY THAT PLAINTIFF COULD NOT RECOVER FOR INJURY TO PERSON DECEASED, if the latter, "by his own neglect or want of care, contributed to the accident," fails to define what character of neglect or want of care would exclude the right to recover, and is clearly erroneous.

ACTION in the name of the state for the use of the widow and children of one Geis, deceased, to recover damages for his death, alleged to have been caused by the negligence of the appellant. The deceased was engaged in unloading corn from a car, which stood upon a siding leading into a warehouse located on a public street, in the city of Baltimore. While so engaged as an employee of the purchasers of the corn, he was

thrown from the car, and fatally injured. The car and team belonged to the appellant, and were at the time under the control of the appellant's servant. On the trial the plaintiff offered evidence to show that the team was attached to the car, and that the car started without notice to the deceased, and that the injury was thereby caused. The defendant offered evidence to show that sufficient notice was given to put the deceased on his guard; but that he undertook to assist a drayman, whose dray was beside the car, and while so engaged was thrown out by the sudden movement of the car, and injured. There was also evidence to show that the car, at the time, was partly extending across the sidewalk, in violation of a city ordinance. The material parts of the court's instructions to the jury appear in the opinion.

Daniel M. Thomas and Bernard Carter, for the appellant.

Orville Horwitz and T. B. Horwitz, for the appellee.

By Court, ALVEY, J. That a party will act with due care, both with reference to his own safety and the safety of others, is a natural presumption, to be indulged in all cases until overcome by proof to the contrary. Hence it was not error for the court below to instruct the jury in this case, as was done by granting the third prayer of the plaintiff, that, in considering the question of negligence, it was competent, in connection with all the facts and circumstances of the case, to infer the absence of fault on the part of the deceased from the known disposition of men to avoid injury to themselves.

Objection is taken to the form of the prayer, and to its being liable to misconstruction by the jury. But we must construe it with reference to the facts of the case; and it appears that the evidence was conflicting, tending to create doubt as to whether the deceased was in fault in bringing upon himself his misfortune. There may be cases in which such an instruction would be objectionable, as where there is positive, unconflicting proof of the negligence of the party injured. In such cases, an instruction of the character and form here given might mislead the jury, and for that reason should not be granted. But such was not the character of this case, and we think the instruction proper.

The plaintiff's fourth prayer was properly rejected as offered, and it is not perceived with what propriety it was granted with the modification affixed to it by the court.

There was no evidence showing, or tending to show, that the accident was occasioned by the act or from the fact of violating the city ordinance by the defendant, even if it be conceded that the car in which the deceased was injured occupied at the time a forbidden place on the street. The whole subject of this instruction was apart from the real questions involved in the case, and therefore calculated to mislead the minds of the jury, and should have been withheld from them. The court was in error, therefore, in granting this fourth prayer as modified.

As to the other instructions by the court, we think they were not calculated to evolve and place before the jury the true questions arising in the case.

In the first part of these instructions, it was assumed that the question of remote and proximate cause of the injury was involved, and they were framed with a view to instructing the jury upon that rather intricate and difficult question. But according to our view of the case, no such question was really involved, and the minds of the jury should not have been perplexed with it. In *Price's Case*, 29 Md. 420, the rulings in which are supposed to govern this, a different state of facts existed from those appearing in this record, and questions arose and distinctions were taken there that do not apply here. There, from the nature of the case, the question as to the remote and proximate cause of the death arose. But here, according to the proof of the nature of the accident, if negligence be imputable to both parties in reference to the injury, it must have been concurrent, and co-operated to produce the injury complained of. And in such case, no action would lie; for it would be impossible to apportion the damages, or to exactly ascertain how much each party contributed by his negligence to the production of the injury.

It is true, that, in some cases, there may be negligence in both parties concerned, and yet an action may be maintained; but in such cases it must appear, either that the defendant might, by a proper degree of caution, have avoided the consequences of the injured party's neglect, or that the latter could not, by ordinary care, have avoided the consequences of the defendant's negligence. This, however, implies time for the one party to become aware of the conduct and situation of the other, for neither could be required to anticipate the other's negligence. But where there is a concurrence of negligence of both in the production of injury to one of the parties, the

causes are commingled, and are regarded as equally proximate to the effect produced, and therefore not susceptible of apportionment. And if it be true that the deceased was guilty of negligence, it must, from the nature of the accident, have been of this latter character.

In the latter part of the instruction before us, the jury were told that if they should find that the negligence which produced the accident was mutual, and they could not impute to each party his own proper share in the commission thereof, then they were to find for the defendant. This assumed that the jury were at liberty to undertake the task of doing what the law has determined cannot be done,—that of ascertaining the share of negligence that each party contributed to the production of the injury, though the contribution was mutual and concurrent. This was clearly erroneous; and we think, for the reasons assigned, that exception was well taken to the instruction of the court.

As to the defendant's prayers embraced in the exception, we think the court was right in rejecting the first of them. Apart from the objection that it would appear to require it to be proved affirmatively, as a condition to the right to recover, that the deceased did not, by his own neglect or want of care, contribute to the accident, it fails to define what character of neglect or want of care would exclude the right to recover. To defeat the right on such ground, the deceased must have been guilty of some want of ordinary care and prudence which directly contributed to the injury. To put the question to the jury, as was sought to have been done by this prayer, without thus defining the degree of neglect that would defeat the action, might lead to wild speculation as to what constituted contributory negligence. We discover, however, no objection to the defendant's second prayer, and think it ought to have been granted. It states a proposition that is sustained by all the cases upon the subject.

We shall therefore reverse the judgment of the court below, and award a *procedendo*.

Judgment reversed, and *procedendo* awarded.

CONTRIBUTORY NEGLIGENCE AS BAR TO RECOVERY: See *Lucas v. Railroad Co.*, 66 Am. Dec. 406, and note 410; *Johnson v. Railroad Co.*, 75 Id. 375, and note 383; *Chapman v. Railroad Co.*, 75 Id. 344, and note 346; *Gahagan v. Railroad Co.*, 79 Id. 724, and note 726; *Chicago etc. R. R. Co. v. Dewey*, 79 Id. 374, and note 376.

ONE OFFENDER AGAINST LAW CANNOT SET UP AS DEFENSE THAT PLAINTIFF WAS ALSO OFFENDER, unless the parties were engaged in the same illegal transaction: *Wallace v. Cannon*, 95 Am. Dec. 385.

CONFLICTING EVIDENCE AS TO NEGLIGENCE SHOULD BE SUBMITTED TO JURY: *Simmons v. Steamboat Co.*, 93 Am. Dec. 99, and cases collected in note 106.

THE PRINCIPAL CASE IS CITED to the first point stated in the *syllabus*, in *Maryland Cent. R. R. Co. v. Neubeur*, 62 Md. 402.

SHOEMAKER v. NATIONAL MECHANICS' BANK OF BALTIMORE.

[81 MARYLAND, 396.]

GRANTING OR REFUSING OF WRIT OF INJUNCTION is a matter resting in the sound discretion of the court.

IT IS DUTY OF PARTY APPLYING FOR WRIT OF INJUNCTION, not only to make a full and candid disclosure of all the facts in his case, but also to produce, if in his power, strong *prima facie* evidence in support of the averments upon which his alleged equity rests.

BANKING CORPORATION — INJUNCTION TO RESTRAIN MISAPPLICATION OF FUNDS. — A bank loaned money in excess of the amount it was authorized by law to lend, taking collateral securities therefor. A stockholder of the bank filed a bill, alleging in substance the illegality of the loan, that no title or interest in said collaterals passed to the bank, and that they were worthless and fraudulent; and praying for an injunction to restrain the bank from misapplying its funds in the prosecution of suits to recover their value. It was *held*, — 1. That the failure of the complainant to file copies of the pleadings and proceedings in the suits sought to be enjoined, as exhibits with his bill, was a fatal defect; 2. That although the loan by the bank was illegal and void, yet, being an executed contract, the bank acquired an absolute or qualified interest in or title to the securities; 3. That the bank directors, when protecting such title or interest, by suit or otherwise, are acting within the sphere of their authority, and cannot be controlled by the courts.

BILL in equity. Injunction. The opinion states the case.

J. Dean Smith and Joseph H. Bradley, Sen., for the appellant.

Robert J. Brent and I. Nevett Steele, for the appellees.

By Court, ROBINSON, J. No principle is better established than that the granting or refusing of a writ of injunction is a matter resting in the sound discretion of the court.

It is the duty of the party making application for it, not only to make a full and candid disclosure of all the facts of his case, but also to produce, if in his power, strong *prima facie* evidence in support of the averments upon which his alleged equity rests.

Thus it has been repeatedly held that the mere oath of a party to the existence of a debt, of which he holds in his possession the written evidence, but which he fails to produce, or to assign a satisfactory reason therefor, will not, on an application for an injunction, be regarded as any proof of the debt: *Union Bank v. Poultney*, 8 Gill & J. 332; *Nusbaum v. Stein*, 12 Ind. 318; *Hankey v. Abrahams*, 29 Md. 588.

This rule applies with peculiar force to this case. Here the court is called upon to interfere with the management of the affairs of a corporation, the exclusive control of which is, by the charter, confided to the officers and directors chosen by the stockholders themselves. And although it is the duty of the court to interpose to prevent the diversion of the funds and assets to purposes foreign to and inconsistent with the plain and obvious purposes of the charter, yet in such a case, to entitle a party to an injunction, the bill and exhibits ought to present a clear and undoubted claim for relief. Otherwise, instead of being a remedial process to promote the ends of justice, it may become the instrument of oppression and irreparable injury.

Has the complainant presented a case coming within these general principles, is the question to be decided on this appeal.

The bill, in substance, alleges that the bank defendant was incorporated under the general currency act of Congress, approved June 3, 1864, with a capital stock of six hundred thousand dollars; that the twenty-ninth section of that act provides "that the total liabilities to any association formed under said act, of any person or company, or of any corporation, for money loaned, shall at no time exceed one tenth part of the capital stock of such association actually paid in"; that its officers and directors, in violation of said section, constantly and habitually loaned to a certain firm of Bayne & Co. sums largely in excess of said amount, and that in 1866 the said firm became insolvent, owing to the bank, on account of said loans, over three hundred thousand dollars; that, to secure these loans, Bayne pledged certain collaterals, including 1,250 shares of the Washington, Georgetown, and Alexandria Railroad Company; that said loans being illegal and void, no title or interest in said collaterals passed to the bank; that notwithstanding these facts, the defendants are expending the money of the bank in conducting sundry suits, involving the pretended title to said stock, and in building or repairing bridge belonging to said company.

After a prayer for general relief, the complainant further prays that the defendants may be restrained from further prosecuting said suits, or in expending the money of the bank in regard thereto, or in building or repairing said bridge.

Now, what proof is offered in support of these material and vital averments? Do they not rest solely upon the oath of the complainant? No exhibits are filed, — not even copies of the pleadings or proceedings, from which the court might learn the nature and character of the suits, the names of the parties, and the grounds upon which their respective claims are based. What if these exhibits should disclose the fact that the complainant is a party claiming adversely in the very suits which he seeks to enjoin? or that the defendants claim title to the stock through other persons than Bayne & Co.?

If in the case of *Union Bank v. Poultney*, 8 Gill & J. 333, the oath of a party as to the existence of a debt was held insufficient to prove the debt, the written evidence of which was in his possession, but not produced, so in this case the failure to file copies of the pleadings or proceedings as exhibits, in support of the averments in regard to the object and purposes of the suits sought to be enjoined, must be considered a fatal defect. This evidence it was in the power of the complainant to have produced, and without it, or some other proof to satisfy the conscience of the court of the truth of the facts alleged in the bill, he failed to present a case such as would justify the granting of an injunction.

But waiving all objections to the bill in this behalf, how stands the case upon its merits?

The complainant insists that the loans to Bayne & Co. being illegal, the bank could acquire no title to the collaterals, pledged to secure their payment, and that in maintaining this pretended title by suit, the defendants are misapplying the assets of the bank.

Now, so far as this case is concerned, it is unnecessary to decide whether the loans are illegal and void because of their violation of the twenty-ninth section of the currency act, or whether it was the purpose of the framers of the law to subject the bank only to the penalty prescribed by the fifty-third section of said act.

If we concede that they are illegal and void, without, however, so deciding, it is sufficient to say that the bank is not here invoking the aid of the court to enforce their payment,

nor are Bayne & Co. shielding themselves from liability by any such defense.

On the contrary, the party who sets up their illegality,—who denies the title of the bank to the 1,250 shares of stock, the par value of which is one hundred and twenty-five thousand dollars, and to the other collaterals, the value of which is not stated,—who prays the court to restrain the directors from defending or asserting their title to the same,—is himself a stockholder of the bank defendant.

How or in what manner it would promote his interest, or that of other stockholders, to deprive this bank of the only security which it holds for loans amounting to more than one half of its capital, we must confess it is rather difficult to imagine. Be this, however, as it may, the question is not whether this court would enforce an illegal contract, but whether, being executed, and under it Bayne & Co. having received the money, and the bank being in possession of the securities upon the faith of which the loans were made, it will be held, upon the application of the complainant not a party to the contract, that under it the bank acquired no interest in the collaterals, and that in asserting that interest the directors are guilty of a violation and breach of trust.

We take the law to be settled that, although as a general rule an illegal contract cannot be enforced, yet if executed, and under it a party has paid money, he will not be permitted to recover it back.

In the language of Chief Justice Wilmot, in *Collins v. Blantern*, 1 Smith's Lead. Cas. 497:—

“Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again.”

In other words, if Bayne & Co. had paid the money borrowed under these loans, will it be contended that they could recover it back? Would a court listen for a moment to such an unjust demand? Or if unable or unwilling to pay the money, could they recover the collaterals pledged by them, and upon the faith of which the loans were made? Would not a court require them to discharge their honest obligations,—to pay the money borrowed, to do what was equitable and just,—if they required equity to be meted out to them?

It is well known that, prior to the act of 1845, usurious con-

tracts were denounced in this state by statutory law as illegal and void; yet in *Trumbo v. Blizzard*, 6 Gill & J. 18, it was held that a party seeking to avoid such contracts could only obtain relief by paying the principal and legal interest.

The same principle was asserted in *Lucas v. Latour*, 6 Har. & J. 100, where the trustee of an insolvent petitioner brought an action of trover to recover the value of property pledged by the insolvent to secure a usurious loan. In that as in this case, it was pressed in argument that the loan being illegal and void, the lender could acquire no title or interest in the property pledged as security for its payment. But it was held otherwise, and the trustee failed to recover.

From these cases, and the principles which underlie the decisions, it must follow that neither Bayne & Co. nor their assignees could deprive the bank of these collaterals without paying the loans to secure which they were pledged. If so, then it must also follow that the bank has an interest in or title to them,—whether absolute or qualified, it is immaterial,—and the right of the defendants as directors to protect that interest, whether by suit or otherwise, cannot be questioned. To them the management of the affairs of the corporation is by the charter confided, and thus acting within the sphere of their authority, they cannot be controlled by this court.

The case of *Albert v. Savings Bank*, 2 Md. 160, is not in conflict with these views. There it was held that a *cestui que trust* could recover property which his trustee, in violation of the trust, had pledged to secure an illegal loan; but the court impliedly admit that if the trustee had pledged his property he would have been estopped.

This case is also distinguishable from *President etc. of the Maryland Hospital v. Foreman*, 29 Md. 524. It was decided, in that case, that the plaintiff was entitled to recover, because the contract under which the money had been paid was neither *malum in se* nor *malum prohibitum*, and the principle *in pari delicto* did not apply.

The objection fatal to the contract, in that case, was the want of power on the part of the corporation to make it. In the language of the court, it "was simply *ultra vires*, and therefore not binding on the parties."

We are also of opinion that the complainant is not entitled to an injunction upon the allegation that the defendants are using the money of the bank in building or repairing the bridge belonging to the company.

The copy of the contract made by Riddle, trustee, with Clephane, receiver of the road, and filed as an exhibit in support of the bill, shows that if the bank had any connection with the contract, it was by loaning money upon the credit of the road.

The purposes to which Clephane might apply the money could not surely impair the corporate power to make the loan. Whether the defendants exercised a wise discretion in making it, or in accepting the security offered, are questions over which we have no control.

For these reasons, the order of the court below refusing an injunction will be affirmed.

Order affirmed.

WHAT FACTS MUST BE SET FORTH TO ENTITLE PETITIONER TO INJUNCTION: See *Pensacola etc. R. R. Co. v. Spratt*, 91 Am. Dec. 747, and note 757.

GRANTING OR REFUSING INJUNCTION MUST ALWAYS REST IN SOUND DISCRETION OF COURT, governed by the nature of the case: *Hine v. Stephens*, 89 Am. Dec. 217; *Reddall v. Bryan*, 74 Id. 550, and note 554.

IF COMPLAINANT'S RIGHT IS DOUBTFUL, AND NO IRREPARABLE DAMAGE HAS BEEN OR IS BEING DONE, it is not a proper case for an injunction: *Hinchman v. Railroad Co.*, 86 Am. Dec. 252, and note 258.

THE PRINCIPAL CASE IS CITED to the second point stated in the *syllabus*, in *Johnston v. Glenn*, 40 Md. 207.

LISTER v. ALLEN.

[81 MARYLAND, 548.]

IT IS DUTY OF PERSONS DEALING WITH SPECIAL AGENT TO ASCERTAIN the extent of his authority, and the principal is not bound by any act of the agent not warranted expressly by, or fairly and necessarily implied from, the terms of the authority delegated to him.

THIRD PERSONS DEALING WITH AGENT IN GOOD FAITH ARE NOT BOUND by the limitations placed on the agent's authority by the private instructions of the principal, which are not known to such third parties, nor properly inferable from the nature of the agent's employment.

GENERAL AUTHORITY ARISES FROM GENERAL EMPLOYMENT in a specific capacity, such as factor, broker, attorney, etc. Such authority empowers the agent to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or direction not known to the party dealing with the agent.

PRINCIPAL WILL BE BOUND BY ACTS OF AGENT, although a mere special agent, whom he clothes with all the apparent muniments of an absolute title to the property in himself.

AGENCY. The opinion states the case.

William H. Cowan, for the appellants.

Daniel Ratcliffe, for the appellee.

By Court, BARTOL, C. J. The appellee, plaintiff below, was entitled under the laws of the state, as widow of Richard Allen, late a soldier in the United States army, to receive from the treasury the sum of three hundred dollars for bounty due the deceased.

Her claim, made out in due form of law, with the requisite affidavits and proof annexed, was placed by her for collection in the hands of William E. Hanson, and appended thereto was the following order or draft:—

“\$300.

186—.

“The treasurer of the state of Maryland, pay to the order of William E. Hanson the sum of three hundred dollars, being balance of state bounty due me as the widow of Richard Allen, a volunteer in company H, in 30th Regiment, U. S. C. troops. Under the act of the general assembly of Maryland of 1864, chapter 15, and amendments thereto.”

“EMELINE ^{her} × ^{mark.} ALLEN.”

“Witnessed by Jos. B. RUTH, J. P.”

Evidence was offered to prove that Hanson paid nothing to the plaintiff for the claim; that he passed it over to one James Campbell, a bounty broker, but for what consideration does not appear. Campbell sold it to the appellants for \$165, and they received the amount (\$300) from the treasury. The object of the suit is to recover from them this sum, as money had and received for the use of the plaintiff.

At the trial the defendants asked the court to instruct the jury “that if they found the defendants purchased the claim for bounty in question at a fair market price, without any collusion with Hanson or his agent, and paid their money for the same, then the plaintiff is not entitled to recover.”

This prayer was refused, and the prayer of the plaintiff was granted, instructing the jury substantially, “that if they believed from the evidence the plaintiff placed her claim in the hands of Hanson, a claim agent, with an understanding that the same should be collected in the usual mode, and paid over to her, but without authority to sell the said claim, and that Hanson sold the same, or caused it to be sold, without her authority or consent, to the defendants, who afterwards collected the full amount from the state, then the plaintiff is

entitled to recover said three hundred dollars, with interest from the date of its payment."

The jury found a verdict in favor of the plaintiff; and the appeal brings up for review the ruling of the court below on the prayers.

The defendants claim exemption from liability, on the ground that they were *bona fide* purchasers of the claim for value. But the court asserted the right of the plaintiff to recover, provided the jury found that Hanson was her agent only to collect, without any authority to sell, and if he sold without her knowledge or consent, the purchasers acquired no title as against her, although they may have acted in good faith.

In support of this position, we have been referred to Chitty on Contracts, 200, and to *Batty v. Carswell*, 2 Johns. 48, and *Rossiter v. Rossiter*, 8 Wend. 494 [24 Am. Dec. 62].

These authorities announce the doctrine that the acts of a special agent do not bind his principal, unless strictly within his authority.

Chitty states the rule as follows: —

"If the agent is appointed only for a particular purpose, and is invested with limited powers, or, in other words, is a special agent, then it is the duty of persons dealing with such agent to ascertain the extent of his authority, and the principal or master will not be bound by any act of the agent not warranted expressly by, or by fair and necessary implication from, the terms of the authority delegated to him."

This general rule is correct; but in the application of it to cases affecting the rights of third persons who have dealt with the agent in good faith, care must be taken not to bind them by limitations placed on the authority of the agent by the private instructions of the principal, which are not known to such third persons, nor properly inferable from the nature of the agent's employment.

In Perkins's note to the text of Chitty, above quoted, page 200, it is correctly said: "A general authority arises from a general employment in a specific capacity, such as factor, broker, attorney, etc. . . . A general authority of this kind empowers the agent to bind the employer by all acts within the scope of his employment, and that power cannot be limited by any private order or direction not known to the party dealing with the agent."

Judge Story, in his work on agency, section 448, says: —

"But the responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his express or implied authority.

"It extends further, and binds the principal in all cases where the agent is acting within the scope of his usual employment, or is held out to the public or to the other party as having competent authority, although in fact he has, in the particular instance, exceeded or violated his instructions and acted without authority. For in all such cases, where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract by holding out the agent as competent to act, and as enjoying his confidence."

"So if the principal should clothe the agent, although a mere special agent, with all the apparent muniments of an absolute title to the property in himself, the principal would be bound by the acts of the latter; as, for example, if he should clothe him with the apparent title to property by a bill of lading of a shipment, as by making the shipment appear to be on account of the agent, or should trust him with negotiable securities indorsed in blank, a sale or disposal thereof by the agent, although in violation of his private orders, would bind the principal, and give correspondent rights and remedies to third persons who become *bona fide* possessors under such sale or other act of disposal against him."

The principle thus stated by Judge Story is supported by the authority both of elementary writers and of adjudged cases, and seems to be applicable to the present case.

Hanson was acting as the attorney in fact for the plaintiff; she placed in his hands the evidence of her bounty claim, and by her written order on the treasurer directed that the same should be paid to the order of Hanson.

As between the original parties, the effect of this transaction was to constitute Hanson as the mere agent or attorney in fact of the plaintiff to collect the money; and he would be liable to her for any violation of duty by the sale or conversion of her property without her authority or consent. But it does not follow that such liability would attach to third persons who have dealt with the agent in good faith, with no other knowledge as to the limits of his agency except what the written papers disclose. On the contrary, the claim being in its nature assignable, as was decided in *Eichelberger v. Sifford*, 27 Md. 320, the possession by Hanson of the written evidence of the claim, and the order or check of the plaintiff thereon

directing the same to be paid to his order, placed in his hands such muniments of title as authorized the appellants to deal with him as owner, or as having the power of disposition; and if they so dealt with him in good faith, and purchased for a valuable consideration, they are entitled to be protected against the claim of the principal, although Hanson may have violated his instructions.

In such case the loss must fall, not upon the appellants, but, upon the plaintiff, who inadvertently, or perhaps ignorantly, placed it in the power of her agent to violate her confidence, or to impose upon third persons.

If the plaintiff's check upon the treasurer, making the money payable to Hanson's order, be regarded as an ordinary negotiable security, then, by the law merchant, the appellants, if they took it in good faith, and without notice of the nature of Hanson's agency, would clearly be entitled to protection as *bona fide* indorsees for value.

But without placing the case upon this ground, treating the claim as a mere chose in action assignable, the appellants are equally entitled to protection, if they acquired the same *bona fide* and for value from Hanson or his agent, with no other notice of the rights of Hanson, or the nature of his agency, except that furnished by the papers themselves.

Being of opinion that there was error in the instruction given to the jury, the judgment will be reversed, with leave to the appellee to take out writ of *procedendo*.

Judgment reversed, with leave to take out *procedendo*.

ACT OF AGENT WHICH IS WARRANTED BY TERMS OF HIS POWER IS BINDING UPON HIS PRINCIPAL, as to all persons dealing in good faith with the agent: *Westfield Bank v. Cornen*, 93 Am. Dec. 573, and note 577; *Lavo v. Stokes*, 90 Id. 655, and note 659.

NOTICE TO THIRD PERSONS OF TERMINATION OF AGENCY, WHAT SUFFICIENT: *Van Dusen v. Mining Co.*, 95 Am. Dec. 209. The agent may bind his principal within the scope of authority formerly possessed by him, until the third persons with whom he deals have been notified of the termination of the agency: *Id.*, and cases collected in note 213.

THE PRINCIPAL CASE IS CITED to the fourth point stated in the *syllabus*, in *Reynolds v. Davison*, 34 Md. 668; *Tome v. Railroad Co.*, 39 Id. 83; *Tubman v. Lowekamp*, 43 Id. 324.

STODDERT v. WARD.

[81 MARYLAND, 562.]

TAX ASSESSMENTS OUGHT NOT TO BE VACATED, and property liable to taxation released altogether, because the public officers have not strictly followed the provisions of the law, which are merely directory. And a court of equity cannot interfere for such cause to relieve a party from the payment of taxes assessed upon his property by the proper authority.

CHANGE OF DOMICILE, SO FAR AS IT RESPECTS QUESTION OF TAXATION, cannot be effected by intention alone, and without actual removal.

PERSON IS LIABLE TO TAXATION AS CITIZEN OF CERTAIN COUNTY SO LONG as he continues in fact to reside in such county; and the levy of the year being completed while he so continues to reside in the county, and before he removes therefrom, he is chargeable with the taxes assessed for that year.

APPLICATION for an injunction. The opinion states the case.

Peter W. Crain, for the appellant.

Vivian Brent, for the appellees.

By Court, BARTOL, C. J. This is an appeal from an order of the circuit court of Charles County, refusing to grant an injunction restraining the appellees for collecting from the appellant taxes under the county levy for the year 1869.

The application for the injunction is based on two grounds, —
1. That the county commissioners have failed to comply with the requirements of the act of assembly of 1867, chapter 341, sections 3, 4; 2. That, prior to the levy for the year 1869, the complainant had ceased to be a resident of Charles County, and was not subject to taxation in that county in respect to certain stock owned by him, and included in the levy.

1. The alleged failure of the commissioners to comply with the requirements of the act of 1867, as averred in the bill, and stated in argument, is supposed to consist in their alleged omission to execute the provisions of the third and fourth sections, by causing all property of every description liable to taxation to be assessed, and especially their omission, as alleged, to ascertain, as directed by the act, "from banking institutions and other corporations full and complete lists of all such property held by the citizens of Charles County." The bill charges that they have not executed the law, and that many persons holding such property have thereby been exonerated from paying and contributing their just and proper share to the support

of the county charges. And consequently the appellant has been required to contribute more than his just and equal proportion to the support of the government.

There is no specification of any property which was liable to taxation and not assessed. The allegation in the bill is in general terms, charging substantially that by the provisions of the act it is made the duty of the commissioners to cause all property to be assessed, and that all has not been included in the assessment.

Under any revenue system that can be devised, some of the property of the citizens will escape taxation, especially such as is intangible, consisting of public and private securities, the evidences of which are only in the possession of the tax-payer, who has not the honesty to make them known to the officers of the law. No skill in the framing of the tax laws, or vigilance in their execution, can entirely prevent frauds upon the public revenue, committed by parties concealing from the assessment property lawfully taxable.

In the execution of the revenue laws, the constitution and the acts of assembly have provided for the selection of certain public officers charged with the duty of assessing and collecting the public taxes. If any errors, omissions, or irregularities occur in the discharge of their duties, such errors may be corrected by the means which the tax laws provide. "Tax assessments ought not to be vacated, and property liable to taxation released altogether, because the public officers have not strictly followed the provisions of the law, which are merely directory. Assessments are not invalid if such directions are not complied with": *O'Neal v. Bridge Company*, 18 Md. 1.

In that case it was decided that a court of chancery cannot interfere for such cause to relieve a party from the payment of taxes assessed upon his property by the proper authority.

2. Does it appear by the averments in the bill, and the exhibits filed therewith, that the appellant was not a citizen of Charles County when the levy for 1869 was made?

He was owner of ninety thousand dollars of the stock debt of the city of Baltimore, and would not be liable to be assessed and taxed thereon in Charles County in 1869, if before the levy for that year was completed he had actually removed from the county, and had furnished to the commissioners the requisite evidence of such removal.

By the act of 1866, chapter 157, section 9, it is provided that "all property owned by residents of this state, and not perma-

nently located elsewhere within the state, shall be assessed to the owner in the county or city where he resides."

Previous to the year 1869, the appellant had long been a resident of Charles County, and had been assessed and paid taxes on his property, as such.

Early in the year 1869 he resolved to change his residence, and removed to the city of Baltimore.

In his letter to the commissioners, exhibited with the bill of complaint, dated March 22, 1869, he says: "I have this day received information (which I have sought for two months, in vain) which determines me on removing to the city of Baltimore"; asking them to apportion his taxes for 1869, and stating that his farm, horses, cattle, etc., will be the only property subject to county taxation. "The city stock and other personal property attaches to the domicile of the owners."

After this letter he continued in Charles County, with the intention to remove to Baltimore, but not actually removing till the seventeenth day of April, 1869, when he addressed another letter to the commissioners upon the subject of the proof required by them with regard to his residence, and stating: "I should have been residing in Baltimore in person, not in person and intent only, six weeks ago, if my daughter's illness of three weeks and more, following of five weeks, had not detained me here."

In reply to this letter, the commissioners, by their clerk, addressed a letter to the appellant, dated April 27, 1869, saying:—

"Your favor of the 17th was to-day submitted to the board of county commissioners, and they direct me to inform you that your application for a deduction on your taxable property came too late for this year, as they had already held their term for changing and making abatements on the assessable property for the year."

The only additional evidence furnished by the record, as to the time of the actual removal of the appellant to Baltimore, is a letter addressed to the clerk of the board of commissioners by John H. Barnes, register of Baltimore City, dated May 14, 1869, saying:—

"In the month of January of the current year, John T. Stoddert, Esq., of your county, communicated to me by letter his intention to remove to our city immediately, and make it his future home, and register his personal property here.

"In pursuance of such purpose, he has reported himself to

me as a citizen of Baltimore, and his stocks are registered upon our books."

From this statement of facts, as disclosed by the bill and exhibits, it is apparent that the appellant continued in fact to reside in Charles County until as late as the twenty-seventh day of April, or perhaps till some time in May,—on or about the 14th. It is also evident that he had the fixed intention to remove to Baltimore as early as the twenty-second day of March, or perhaps before that time; and the error into which he seems to have fallen is, that in a case like this the question of domicile depends merely upon intention, and that he ceased to be a citizen of Charles County, liable to taxation as such, so soon as he determined to remove from the county, and communicated that purpose to the commissioners.

In this view we think he was in error. In our judgment, his change of domicile, so far as it respects the question of taxation, could not be effected by intention alone, and without actual removal.

So long as he continued in fact to reside in Charles County, he was liable to taxation as a citizen thereof; and the levy for the year 1869 having been completed while he so continued to reside in the county, and before he removed therefrom, he is chargeable with the taxes assessed for that year; and the injunction was properly refused.

Order affirmed.

QUO MODO OF TAXATION IS MATTER OF LEGISLATIVE CONTROL: *De Witt v. Hays*, 56 Am. Dec. 352.

LEGISLATURE HAS POWER TO PRESCRIBE FORM OF PROCEEDINGS IN ASSESSMENT AND COLLECTION OF TAXES, and in matters of form may declare what steps shall or shall not be essential to the validity of a tax sale or tax deed: *Smith v. Smith*, 88 Am. Dec. 707; but cannot validate an invalid tax sale by a subsequent law: *Conway v. Cable*, 87 Id. 240.

ACT OF TAXING PROPERTY IS ACKNOWLEDGMENT OF LEGAL STATUS OF PERSON OR COMPANY upon whom the tax is levied: *Eric R'y Co. v. State*, 86 Am. Dec. 226.

ACTS OF ASSESSOR IN MAKING TAX ASSESSMENTS ARE INVALID, unless the provisions of the statute are strictly followed: *Moss v. Sharr*, 85 Am. Dec. 94, and see note 100.

SCHOOLEY v. ROMAIN.

[81 MARYLAND, 574.]

STIPULATION IN MORTGAGE, PROVIDING that the whole debt secured thereby shall become due and payable, upon failure to pay the interest annually, is a legal and valid stipulation, and is not in the nature of a penalty or forfeiture.

ASSIGNEES OF EQUITY OF REDEMPTION TAKE LAND subject to the mortgage and the covenants therein, which may be enforced against the land in the same manner and to the same extent as if the assignment had not been made.

BILL in equity to foreclose a mortgage, and for a sale of the mortgaged premises. The bill was filed by John Romain, and alleged in substance that Peers and Richmond being indebted to him on their bond or obligation, bearing date the 24th of July, 1866, on the same day, with their respective wives, executed a mortgage to secure the payment thereof, according to its terms. The obligation provided "that the said sum of money should bear interest from the twelfth day of July, 1866, at six per cent per annum, and be payable annually from the said twelfth day of July, 1866; and that if said interest should be punctually paid when the same falls due, the obligors should have five years from said twelfth day of July in said year in which to pay the principal; but that if default should be made in the punctual payment of the interest, the whole principal should become due and demandable"; and the mortgage contained a covenant to the same effect. There was a sale of the equity of redemption, and default in the payment of the interest. The original mortgagors, and Schooley and Price, the purchasers of the equity of redemption, were all made parties defendant to the suit. The court below decreed the sale of the mortgaged premises, etc., from which decree this appeal was taken.

A. H. Handy, for the appellants.

Jones, attorney-general, for the appellee.

By Court, BARTOL, C. J. Upon the question of the construction of the mortgage, and the bond or obligation of Richmond and Peers, to enforce the payment of which this bill was filed, we entirely agree with the circuit court; and upon the reasoning contained in the opinion of that court, sent up with the record, and the authorities therein cited, we are willing to rest our decision of that question. The object of the suit is to enforce the payment of the mortgage debt and interest according

to the terms of the contract; it is in no sense a proceeding to enforce a penalty or forfeiture.

We agree also with the circuit court in the opinion that the appellants, as assignees of the equity of redemption, took the land subject to the mortgage and the covenants therein, which may be enforced against the land in the same manner and to the same extent as if the assignment had not been made.

The only remaining question is, Was there a default in the payment of the interest?

It became due on the twelfth day of July, 1867.

On the part of the appellants it has been contended that the contract was to be performed where it was made, in Somerset County, Maryland; that the appellee resided in New York, and had no agent in Somerset County authorized to receive the money, and that they were not bound to pay or tender the money in New York, where alone the appellee was to be found.

Assuming, for the sake of the argument, that this position is correct, the appellants were bound to show that they were ready to pay the interest when it fell due.

It is averred in their answers that they were so ready; but this averment is entirely unsupported by the proof; on the contrary, the evidence shows that they were not ready with the money to pay the interest, at any place, when it became due; their default is without sufficient legal excuse, and the right of the appellee thereupon to demand the payment of the principal, according to the terms of the covenant, cannot be questioned.

The decree of the circuit court must be affirmed, with costs to the appellee.

Decree affirmed.

FORFEITURES, AND RELIEF AGAINST IN EQUITY: *Smith v. Mariner*, 68 Am. Dec. 73, and extended note 85.

RIGHTS OF GRANTEE OF EQUITY OF REDEMPTION: See *McMillan v. Richards*, 70 Am. Dec. 655, and cases collected in note 675.

THE PRINCIPAL CASE IS CITED and approved to the first point stated in the syllabus, in *Mobray v. Leckie*, 42 Md. 476.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

COMMONWEALTH v. MACLOON.

[101 MASSACHUSETTS, 1.]

CITIZEN OF FOREIGN COUNTRY, OR OF ANOTHER STATE, MAY BE CONVICTED OF MANSLAUGHTER IN MASSACHUSETTS, if he inflicts injuries upon another person upon the high seas, and the latter dies within that commonwealth from the effect of such injuries.

ALLEGATION IN INDICTMENT FOR MANSLAUGHTER IS NOT BAD FOR DUPLICITY neither for alleging that death was caused by a wounding, an exposure to cold and inclement weather, and a starving, nor for a failure to state that such acts, or either of them, were mortal, or of a mortal nature. Such indictment will be sustained by proof that death was caused by all or any of such inflicted injuries.

WORD "INFLECT" DOES NOT NECESSARILY IMPLY DIRECT VIOLENCE.

WORDS "INFLECTED INJURY" MEAN ANY BODILY HARM which is caused by one to be suffered upon another.

DEFENDANT CANNOT BE CONVICTED OF MANSLAUGHTER, unless he did all of the acts which occasioned the death, or aided or abetted the doing of such acts.

CONVICTION MAY BE HAD FOR CAUSING DEATH BY STARVATION OR EXPOSURE, under a statute providing for the punishment of causing death within the state by means of "a mortal wound given, or other violence or injury inflicted."

ONE WHO DOES CRIMINAL ACT IN ONE COUNTY OR STATE MAY BE HELD LIABLE for its continuous operation in another.

CRIMINAL HOMICIDE DEFINED.

INDICTMENT against C. H. Macloon, Frank Macloon, and N. Kearney for manslaughter. It alleged that, on December 1, 1867, and at divers other times between that day and February 6, 1868, on the high seas, defendants did, in and upon Charles E. Hooper, feloniously, willfully, and designedly,

make divers, to wit, twenty, assaults, and with a club, and with a belaying-pin, and with a rope, and with an iron hook, and with a heaver, in and upon his head, chest, arms, shoulders, and back, at the several times aforesaid, on the high seas aforesaid, feloniously and wickedly did strike and beat, then and there, thereby giving to him, in and upon his head, chest, arms, shoulders, and back, divers, to wit, twenty, wounds; and did then, and at the several times aforesaid, there inflict divers other injuries upon his body, by then and there willfully, designedly, and feloniously exposing him to the severities of the weather, and to the wind, the rain, the frost, and the cold, and by then and there willfully, designedly, and feloniously depriving him of sufficient and suitable food and nourishment, the defendants being then, and at said several times, there legally obliged and bound to supply him with sufficient and suitable food and nourishment, and having sufficient and suitable food and nourishment to give him, and he being unable to procure and provide for himself such suitable food and nourishment; that after the injuries aforesaid inflicted as aforesaid upon him, he came to Chelsea, in the county of Suffolk, and this commonwealth, and there, by means of the wounds and other injuries aforesaid, so as aforesaid inflicted by the defendants upon him, he, on February 6, 1868, did die; and so the defendants, in manner and form as aforesaid, did feloniously kill and slay him, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided. Defendants moved to quash the indictment, for want of jurisdiction, for duplicity, and for want of proper, sufficient, and legal description of the wounds or injuries supposed, or the character or effect thereof. The motion was overruled. C. H. Macloon was a citizen of Maine, and was master of the British ship *Themis*; N. Kearney, an Englishman, was mate, and Frank Macloon, a citizen of Maine, was the third mate of such vessel, which was sailing under the British flag from Liverpool to Boston, Massachusetts, where she arrived February 4, 1868. Charles E. Hooper, a citizen of Maine, was a seaman of and upon said ship. There was evidence tending to prove the allegations of the indictment, and that Hooper was carried from the ship at the wharf to a hospital in Chelsea, where he died, February 6, 1868. The court instructed the jury that "in order to sustain the indictment against all the defendants, the government must prove the acts alleged, or some, or some one of them; that the death

ensued in the county of Suffolk from the said act or acts proved, and that all the defendants were guilty of said act or acts; that they were all guilty at the time of commission, being present doing the act or acts, or then and there aiding and abetting in the doing. No defendants not present, doing, or aiding, or abetting in doing an alleged act or acts, from which death ensued, can be found guilty. But if the jury are satisfied that any one or more of the alleged acts was or were the cause of the death, they may inquire whether the defendants, or any two, or any one of them did, or being present with others, aided and abetted in the doing of said act or acts, and any defendant who is proved to have done, or being present, to have aided or abetted in doing said acts, may be found guilty. No defendant can be convicted of manslaughter from his mere neglect, unless it is neglect of a duty he was legally bound to perform. No defendant can be convicted, unless he did, or was aiding or abetting the doing of all the acts which occasioned the death. If the jury are satisfied, beyond reasonable doubt, upon the whole evidence, that a certain act, or certain acts, was or were the cause of the death, and that either, any, or all of the defendants willfully and knowingly did, or being present, aided or abetted in doing said act or acts, those thus participating may be found guilty. The fact, if proved, that the wounds and injuries were inflicted and received upon the high seas, on board a British ship, and under the British flag, without this commonwealth, will not be fatal to the maintenance of the indictment, provided death, resulting from said wounds and injuries, ensued in the county of Suffolk." The jury found C. H. Macloon and Kearney guilty, and acquitted the other defendant. The two former alleged exceptions.

J. H. Bradley and F. F. Heard, for the defendants.

O. Allen, attorney-general, for the commonwealth.

By Court, GRAY, J. The defendants, the one a citizen of Maine, and the other a British subject, have been convicted in the superior court in Suffolk of manslaughter of a man who died within the county in consequence of injuries inflicted by them upon him in a British merchant ship on the high seas.

The principal question in the case is that of jurisdiction, which touches the sovereign power of the commonwealth to bring to justice the murderers of those who die within its borders. This question has been ably and thoroughly argued,

and has received the consideration which its importance demands.

The statute on which the defendants were indicted, after prescribing the punishment for murder and manslaughter, provides that "if a mortal wound is given, or other violence or injury inflicted, or poison is administered, on the high seas or on land, either within or without the limits of this state, by means whereof death ensues in any county thereof, such offense may be prosecuted and punished in the county where the death happens": Gen. Stats., c. 171, sec. 19.

This statute is founded upon the general power of the legislature, except so far as restrained by the constitutions of the commonwealth and of the United States, to declare any willful or negligent act which causes an injury to person or property within its territory to be a crime, and to provide for the punishment of the offender upon being apprehended within its jurisdiction.

Whenever any act, which, if committed wholly within one jurisdiction, would be criminal, is committed partly in and partly out of that jurisdiction, the question is, whether so much of the act as operates in the county or state in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction.

A good illustration of this is afforded by the cases of bringing stolen goods from one jurisdiction to another. It has been held from the earliest times that if a thief steals goods in one county, and brings them into another, he may be indicted in either county, because his unlawful carrying in the second is deemed a continuance of the unlawful taking, and so all the essential elements of larceny exist in the second; but if he takes the goods by force, although this is robbery in the county in which he first takes them, it is but larceny in any county into which he afterwards carries them, because no violence to the person has been used in the latter: 1 Hale P. C. 507, 508, 536; 2 Id. 163; 4 Bla. Com. 305. If he steals goods on the high seas or in a foreign country, and brings them into this state, it is not a common-law larceny, because there has been no taking against the law which is invoked to punish him: *Butler's Case*, 13 Coke, 53; S. C., 3 Inst. 113; *Commonwealth v. Uprichard*, 3 Gray, 434 [63 Am. Dec. 762]. Yet if the legislature see fit to provide that the bringing into the state of goods taken without right from the owner in a foreign country shall be punished here as larceny, it is within

their constitutional authority to do so: *People v. Burke*, 11 Wend. 129; *State v. Seay*, 3 Stew. 123 [20 Am. Dec. 66]; *Hem-maker v. State*, 12 Mo. 453 [51 Am. Dec. 172]. By a series of decisions, beginning while the states of this Union were colonies of Great Britain, it has been held that a bringing into Massachusetts of goods stolen in another colony or state, subject to the same national sovereignty, might be indicted here as a larceny at common law: *Commonwealth v. Andrews*, 2 Mass. 14 [3 Am. Dec. 17], and cases cited; *Commonwealth v. Holder*, 9 Gray, 7. And in other states, in which the common law has been held not to reach such a case, a statute declaring such bringing to be larceny in the state into which the goods are brought has been acknowledged to be valid and binding upon the courts: *Simmons v. Commonwealth*, 5 Binn. 619; *Simpson v. State*, 4 Humph. 461; *Beal v. State*, 15 Ind. 378.

The general principle that a man who does a criminal act in one county or state may be held liable for its continuous operation in another has been affirmed in various other cases. Thus a man who erects a nuisance in a river or stream in one county or state is liable, criminally as well as civilly, in any county or state in which it injures the land of another: *Bulwer's Case*, 7 Co. 2 b, 3 b; 2 Hawk., c. 25, sec. 37; Com. Dig., tit. "Action," note 3, 11; Abbott, C. J., in *King v. Burdett*, 4 Barn. & Ald. 175, 176; *Thompson v. Crocker*, 9 Pick. 59; *Stillman v. White Rock Mfg. Co.*, 3 Wood. & M. 538. And one who publishes a libel in another state, in a newspaper which circulates in this commonwealth also, is liable to indictment here: *Commonwealth v. Blanding*, 3 Pick. 304. There is no more reason against holding the wrong-doer criminally liable in the county and state where his victim dies from the continuous operation of his mortal blow than in those to which the flowing water carries the injurious effect of his nuisance to property, or the circulation of his libel extends the injury to reputation.

Criminal homicide consists in the unlawful taking by one human being of the life of another in such a manner that he dies within a year and a day from the time of the giving of the mortal wound. If committed with malice, express or implied by law, it is murder; if without malice, it is manslaughter. No personal injury, however grave, which does not destroy life, will constitute either of these crimes. The injury must continue to affect the body of the victim until his death. If it ceases to operate, and death ensues from another cause,

no murder or manslaughter has been committed. But if the bullet remains in the body, so as to press upon or disturb the vital organs and ultimately produce death, or the wound or the poison causes a gradual decline of health ending in death, the injury and death are as much the continuous operation and effect of the unlawful act as if the shot, the stab, or the poison proves instantly fatal. The unlawful intent with which the wound is made, or the poison administered, attends and qualifies the act until its final result. No repentance or change of purpose, after inflicting the injury or setting in motion the force by means of which it is inflicted, will excuse the criminal. If his unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result, is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction: 1 Hale P. C. 475; *People v. Adams*, 3 Denio, 207 [45 Am. Dec. 468]; S. C., 1 N. Y. 176, 179. If he knowingly lets loose a dangerous beast, which runs any distance, and then kills a man; or incites a madman or a child not of years of discretion to commit murder in his absence, whereby any one is killed; or with intent to murder, leaves poison with another person to be administered to a third, and the poison is administered by the same or another innocent agent, and causes the death of the person intended, or any other,—he is responsible as principal, to the same extent as if personally present at the actual killing: 1 Hale P. C. 430, 431, 615, 617; *Regina v. Michael*, 9 Car. & P. 356; S. C., 2 Moody C. C. 120; *People v. Adams*, 3 Denio, 207, 208 [45 Am. Dec. 468]. And if he willfully inflicts a wound which results fatally, he is not excused by the fact that the negligence of the wounded man or the unskillful treatment of surgeons hastens or contributes to the death: 1 Hale P. C. 428; *Commonwealth v. Hackett*, 2 Allen, 136. The person who unlawfully sets the means of death in motion, whether through an irresponsible instrument or agent, or in the body of the victim, is the guilty cause of the death at the time and place at which his unlawful act produces its fatal result; and, according to the great weight of authority, may be then and there tried and punished, under an express statute, if not by the common law.

The crime not being murder or manslaughter before the death, an indictment alleging the stroke at one day and place, and the death at another day and place, is good if it

alleges the murder or manslaughter to have been at the time and place of the death, but bad if it alleges that the defendant killed and murdered the deceased at the day and place at which the stroke was given; "for," in the words of Lord Coke, "though to some purpose the death hath relation to the blow, yet this relation, being a fiction in law, maketh not the felony to be then committed": 2 Inst. 318; 1 Hale P. C. 427; 2 Id. 188. So the year and day "after the deed, *a pres le fait*," within which, by the statute of Gloucester, an appeal of murder must be brought, was held to run, not from the blow, but from the death; "for before that time no felony was committed": 2 Inst. 320; 1 Hale P. C. 427. And manslaughter arising out of a blow struck in one county, followed by death in another, was held by Mr. Justice Littledale to be a felony "begun in one county and completed in another, within the meaning of a modern English statute authorizing such a felony to be indicted in either county": *Rex v. Jones*, 1 Russell on Crimes, 3d Eng. ed., 549, 550.

Whenever, at common law, murder escaped punishment at the place of the death, it was not from a want of authority in the government, but from a defect in the laws regulating the mode of prosecution and trial.

In the beginning of the reign of Edward III., according to Chief Justice Scrope, if a man died in one county of a wound received in another, the murderer might be indicted and arraigned in the county where the death happened, "and yet the cause of his death began in the other county": Fitz. Abr., tit. Corone, 373. At a later period, it was held that where a man was feloniously stricken or poisoned in one county, and died in another county, no indictment could be found in either county, because both the stroke and the death were necessary to constitute the crime, and the jurors of one county could not inquire of that which was done in another, "unless," as Lord Hale says, "specially enabled by act of Parliament"; and for this reason the custom at one time prevailed of taking the dead body into the county where the mortal stroke was given, and having an indictment found and tried there; and in carrying out the same principle, it was held that an appeal of murder, which required no indictment, but was sued out by the nearest relation, and prosecuted by the king only in case of the withdrawal of the appellant, might be brought in the county of the death, although the mortal stroke was given in another county, provided there were legal means of sum-

moning a jury for the trial out of both counties, but not otherwise: 6 Hen. VII., 10, pl. 7; 3 Inst. 48, 49; 2 Hale P. C. 163; 1 Starkie on Criminal Pleading, 3, and notes.

The statute of 2 & 3 Edw. VI., c. 24, begins with declaring: "Forasmuch as the most necessary office and duty of law is to preserve and save the life of man, and condignly to punish such persons that unlawfully and willfully murder, slay, or destroy men," and after reciting the defects in the previous laws, enacts, "for redress and punishment of which offenses and safeguard of man's life," that "where any person or persons hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, then an indictment thereof founden by jurors of the county where the death shall happen, whether it shall be founden before the coroner upon the sight of such dead body, or before the justices of peace, or other justices or commissioners, which shall have authority to inquire of such offenses, shall be as good and effectual in the law as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founden; any law or usage to the contrary notwithstanding." That statute, passed within a century before the settlement of Massachusetts, and manifestly suitable to our condition, would seem to have been part of our common law: *Commonwealth v. Knowlton*, 2 Mass. 534; *Report of the Judges*, 3 Binn. 595, 620; *State v. Moore*, 26 N. H. 448.

One of the very first statutes passed by the general court of the province declared as one of the rights and liberties of the people, that all trials should be by a jury "of the neighborhood, and in the county or shire where the fact shall arise or grow": Provincial Statutes, 4 Wm. & Mary, 1692, Ancient Charter, 114. That statute was indeed, because of other provisions therein, disallowed by the king in council under the power reserved in the province charter. But it is high evidence of the understanding of the people of the province upon this question, and would seem to be as fully satisfied by a trial in any county in which the act continued to operate as by a trial in the county in which it first began.

The thirteenth article of the declaration of rights, established by the constitution of the commonwealth in 1780, declares that "in criminal prosecutions, the verification of facts in the vicinity where they happen is one of the greatest securities of the life, liberty, and property of the citizen." The stat-

ute of 1795, chapter 45, section 1, which substantially re-enacted the statute of Edw. VI., adding to the cases of stroke or poisoning, "or injury," was held by this court, in *Commonwealth v. Parker*, 2 Pick. 550, not to be inconsistent with that article; and Chief Justice Parker, in delivering judgment, said: "Murder is a complex term, denoting several facts, of which the death of the party is one of the most essential. The mortal stroke, or the administering of poison, does not constitute the crime, unless the sufferer dies thereof within a year and a day": *Commonwealth v. Parker*, 2 Id. 558. That enactment has been embodied in the Revised Statutes, chapter 133, section 8, and General Statutes, chapter 171, section 18.

In the most ancient times of which we have any considerable records, the English courts of common law took jurisdiction of crimes committed at sea, both by English subjects and by foreigners: *Beufo v. Holtham*, 25 Edw. I., in Selden's Notes to Fortescue, c. 32; *Case of the Norman Master and English Seamen*, 40 Assis. 25; S. C., Fitz. Abr., tit. Corone, 216; 13 Coke, 53, 54; 2 Hale P. C. 12, 13, and notes and cases cited. But after the admiralty jurisdiction had been settled by the statutes of 13 & 15 Rich. II., if a mortal stroke was given on the high sea, and the person stricken came to land in England and died there, then, according to the rule established before the statute of Edward VI. in the case of two counties, the courts of common law could not try the murderer, because no jury could inquire of the stroke at sea, and the admiral could not try him, for want of authority to inquire of the death on land: 3 Inst. 48.

Both Lord Coke and Lord Hale, however, were of opinion that such a murderer could not wholly escape punishment, although they differed as to the mode of bringing him to justice.

It is, indeed, reported in 1 Leon. 270, that in the argument of *Lacy's Case*, 25 Eliz., "it was said by Coke, and agreed by Wray [then chief justice of the queen's bench], that if a man be struck upon the high sea, whereof he dieth in another county afterwards, this murder is dispunishable, notwithstanding the statute of 2 Edw. VI." But no such point is stated in the other reports of the case by Sir Francis Moore, and by Coke himself: Moore, 121; S. C., 2 Coke, 93 a; 5 Id. 107 a. And Coke, in his own writings, positively asserts that if a man was mortally wounded in a foreign country, or on the high seas, and died of the wound in England, the mur-

derer might be tried in the court of the constable and marshal: Co. Lit. 74 b; 3 Inst. 48. This opinion appears to have been founded on a strained construction of the statutes of 13 Rich. II., stat. 1, c. 2, which declared that "to the constable it pertaineth to have cognizance of contracts and deeds of arms and of war out of the realm, and also of things that touch arms or war within the realm, which cannot be determined or discussed by the common law."

Lord Hale is clear that the constable and marshal administered the law martial only, and could not try such a case in time of peace: 1 Hale P. C. 500; 2 Id. 20. And in one or two passages of his Pleas of the Crown he speaks of it as *casus omissus*: 1 Id. 426; 2 Id. 163. But when treating of the question more directly, he shows that no decision of the point was had in *Lacy's Case*, *supra*, and expresses the opinion that such an offense might be tried in the courts of common law, especially if the stroke was upon the narrow seas, though out of the body of a county: 2 Id. 12-20.

In his treatise on the admiralty jurisdiction, preserved among the Hargrave manuscripts in the British Museum, he expresses the same opinion more positively, and with a much fuller statement of reasons. After speaking of *Lacy's Case*, as reported in the various books, and quoting from 2 Coke, 93 a, the statement that in that case "those of the county of York could not inquire of his death without inquiring of the stroke, and of the stroke they could not inquire, because it was not given within any county; and those of the admiralty jurisdiction could not, as of a felony, inquire of the stroke without inquiring of the death, and they could not inquire of the death, because it was *infra corpus comitatus*"; and mentioning the opinion of Lord Coke, in 3 Inst. 48, that it was triable before the constable and marshal, he proceeds to state his own opinion, with the reasons for it, as follows: "But it rather seems that in this case the trial of the murder shall be at the common law, especially if the stroke were given, as in *Lacy's Case*, *supra*, in the narrow seas,—1. Because otherwise there would ensue a failure of justice, which cannot be presumed in so long a continuance of time; 2. Because anciently at common law criminal causes, even upon the high sea, were heard and determined in the king's bench upon an indictment in the adjacent county, as appears by the instances before given; 3. Because the jurisdiction of the common law is far more ancient than that of the admiralty, and the latter of no

ancienter an addition than Edward I.; 4. When the common law and admiralty come together, the common law takes place, and therefore, since in this case both the stroke and the death make the felony, the death that is within the county shall, for necessity and to prevent a failure of justice, attract the trial of the whole offense to the common law; 5. The narrow seas are *infra ligeantiam domini regis* and part of his kingdom, and therefore the beginning of the offense being within the kingdom and *contra pacem regis*, though out of the county, and the consummation by the death being in the county, which completes the offense, the trial shall be at the common law; 6. And accordingly was the opinion of the court of king's bench, in *Fulwood's Case*, Mich. 13 Car."

This passage clearly shows that in the opinion of that great jurist, perhaps the highest authority in our criminal law, even a homicide beginning with a stroke upon the high seas, and consummated by death upon land within the realm, might be indicted and tried in the courts of common law in the county where the death took place, by virtue of their inherent general jurisdiction and to prevent a failure of justice. He does not suggest or intimate that this jurisdiction was limited to English subjects; and one of "the instances before given" by him is the *Case of the Norman Master and English Seamen*, already cited, in which, upon a conviction of all for piracy, even the Norman was adjudged guilty of felony, and hanged, although, as Lord Coke tells us, "the Normans were not then under the obedience and allegiance of the king of England (for King John lost Normandy), and for that cause" the Norman could not be held guilty of treason and punished accordingly, as his English companions were: 13 Coke, 53, 54.

In *Fulwood's Case*, *supra*, it was held that, although to constitute the offense of taking against her will and marrying any woman having lands, or other property, which was made a felony by statute 3 Hen. VII., c. 2, there must be both a forcible taking and a marriage, yet if the woman was forcibly taken in one county, and carried into another and there married, "it was a continuing force" in the second county, and might be there indicted: Cro. Car. 488; 1 Hale P. C. 660. Lord Hale's way of referring to this case, at the end of the passage above quoted from his treatise on admiralty jurisdiction, shows that he considered the continuing operation of the mortal blow in the one case as within the same principle as the continuing restraint of the ravisher in the other. And there is earlier

authority for the same view; for Lord Hobart says: "*Quære*, if the taking, and the lands, and the marrying were in several counties; for it is felony composed of all those three things, as murder is of the stroke and death": Hob. 183.

Neither Lord Coke nor Lord Hale suggests any doubt of the rightful power of the legislature to pass a statute to punish whoever should cause death within the realm by an injury on the high seas. And in 1729 the Parliament of Great Britain passed a statute, declared to be "for preventing any failure of justice and taking away all doubts touching the trial of murders in the cases hereinafter mentioned," by which it was enacted that, where any person should be feloniously stricken or poisoned upon the sea or at any place out of England, and should die of the same stroke or poisoning in England; or where any person should be feloniously stricken or poisoned at any place in England, and should die of the same stroke or poisoning upon the sea or at any place out of England,—in either of said cases the offenders, both principals and accessaries, might be indicted, tried, convicted, and sentenced in the county in England in which such death, stroke, or poisoning should happen respectively, with the same effect as if the felonious stroke and death thereby ensuing, or poisoning and death thereby ensuing, had happened in the same county: Stat. 2 Geo. II., c. 21. That statute did not extend to the colonies, and was repealed by statute 9 Geo. IV., c. 31, sec. 1; and no suggestion appears to have been made while it was in force, of its being limited in its application to British subjects: 4 Bla. Com. 303; 1 East P. C. 366. The only published exposition of it is in an opinion given by Sir James Marriott as advocate-general, who, looking upon the subject in the view of the law of nations, wrote: "With respect to murders, when persons die in a foreign country of a wound received within this realm, or die in this realm of a wound received in a foreign country, in either alternative the party giving the wound, and his accessary or accessaries, by statute 2 Geo. II., c. 21, must be tried in England, the statute considering the cause and effect as one continuity of action without interval, in order to found a domestic jurisdiction and to reach the crime": Forsyth's Opinions on Constitutional Law, 218. In *King v. Farrel*, 1 W. Black. 459, Lord Mansfield treated the question whether a murder by a mortal stroke on the high seas, from which death ensued in Ireland, was triable in Ireland, as depending upon the question whether there was any Irish statute upon the subject. In fact, the Irish

statute of 10 Car. I. contained provisions similar to the English statutes of Edw. VI. and Geo. II.: 1 Gabbett's Crim. Law, 501. Thus stood the law of the mother country at the time of the American Revolution.

The courts of the United States have held that a mortal stroke on the high seas, from which death ensues on land, either in a foreign country or within the United States, cannot be indicted under an act of Congress providing for the punishment of murder or manslaughter on the high seas. The reason was thus stated by Mr. Justice Washington in the leading case: "The death, as well as the mortal stroke, must happen on the high seas, to constitute a murder there. . . . The present is a case omitted in the law; and the indictment cannot be sustained. . . . It would be inconsistent with common-law notions to call it murder; but Congress, exercising the constitutional power to define felonies on the high seas, may certainly provide that a mortal stroke on the high sea, wherever the death may happen, shall be adjudged to be a felony": *United States v. McGill*, 4 Dall. 427; S. C., 1 Wash. C. C. 463; *United States v. Armstrong*, 2 Curt. 446. Congress has accordingly passed statutes providing for the punishment, at first of murder only, and afterwards of manslaughter, by a blow, wound, or poison on the high seas, or in any river or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, followed by death on land: *United States Stats.* 1825, c. 65, sec. 4; 1857, c. 116, sec. 1.

The legislature of the commonwealth, from an earlier period, has asserted the right of punishing such crimes in the county where they take final effect by destroying life. At February term, 1795, of this court in Suffolk, a conviction of manslaughter at common law was had upon an indictment charging that Joseph Hood, on the high seas, mortally injured John Antony, by assaulting and beating him with a rope and a stave and his hands and feet, and exposing him without sufficient covering to the cold, winds, and storms, and depriving him of necessary food, of all which injuries he languished on the high seas, and at Boston in said county, and died at Boston. At August term, 1795, judgment was arrested, upon the ground that the indictment charged that the cause of death arose on the high seas, and not within the jurisdiction of this court: *Hood's Case*, Rec. 1795, fol. 216, and papers on file. It was to cure the defect thus declared to exist in our law that

the legislature at its next session, on the 15th of February, 1796, passed the statute of 1795, chapter 45, section 2, by which it was enacted that "where any person hereafter shall be feloniously stricken, poisoned, or injured, on the high seas and without the limits of this commonwealth, and die of the same stroke, poisoning, or injury in any county thereof, that then an indictment thereof, found by the grand jurors of the county where the death shall happen, before the justices of the supreme judicial court there held, shall be as good and effectual in law as if the stroke had been given or the poisoning or injury done in the same county where the party shall die." By later statutes all indictments are returned into the lower court: *Webster v. Commonwealth*, 5 Cush. 386 [52 Am. Dec. 711]; Gen. Stats., c. 171, secs. 1 et seq., 21 et seq. But the substance of this provision, omitting the word "feloniously" (which might be somewhat difficult of application to an act not done under laws of which our courts have judicial knowledge), and extended to cases in which the mortal wound or injury is given on land without the limits of the commonwealth, has been embodied in the Revised Statutes, chapter 133, section 9, and thence, with merely verbal changes, in the General Statutes, chapter 171, section 19, on which this indictment is founded. Neither of these statutes appears to have been made the subject of judicial exposition. But a law which has been kept on the statute-book for such a length of time by repeated enactments is not to be lightly declared invalid for exceeding the legislative power. And it comes within the principle by which the preceding section, relating to death resulting in one county from an unlawful act in another, was held valid in *Commonwealth v. Parker*, 2 Pick. 550, before cited.

A similar enactment, adding, after "high seas," "or on any other navigable waters," has been sustained upon full argument and consideration by the supreme court of Michigan: *Tyler v. People*, 8 Mich. 320. That was the case of an indictment upon a statute, apparently taken from our own revised statutes, inserting only after the words "on the high seas" the words "or any other navigable waters." The majority of the court held that the statute was constitutional, and applied to a case in which the mortal blow was struck on a navigable fresh-water river within the boundaries of Canada, and the man died within the state of Michigan, saying: "We think it clearly within the scope of the legislative power. The expediency or policy of the statute has nothing to do with its con-

stitutionality; and if it was a legitimate subject of inquiry and consideration in determining the constitutional question, we should not hesitate in the present instance to declare in its favor; for the crime, though commenced in Canada, was consummated in Michigan. The shooting itself, and the wound which was its immediate consequence, did not constitute the offense of which the prisoner is convicted. Had death not ensued, he would have been guilty of an assault and battery, not murder, and would have been criminally accountable to the laws of Canada only. But the consequences of the shooting were not confined to Canada. They followed Jones into Michigan, where they continued to operate until the crime was consummated in his death. If such a killing did not, by the common law, constitute murder in Michigan, we think it the clear intent of the statute to make it such, to the same extent as if the wounding and the death had both occurred in the state": *Tyler v. People*, 8 Mich. 333, 334.

The able and learned dissenting opinion of Mr. Justice Campbell proceeds upon the ground that no part of the criminal act of the defendant was done at the place of the death,—a position which seems to us to be untenable for the reasons already stated, and the ingenious arguments and illustrations adduced in support of which will not stand a critical examination.

The argument that, in order to constitute unlawful homicide, the person killed must be "in the king's peace," is fully answered by the passage above quoted from the judgment of the majority of the court. The person killed was, at the time of his death, within the jurisdiction and protection of the state under whose laws the person who killed him was indicted.

It is then said that "the slayer must also, under all the authorities, owe temporary or permanent allegiance to the sovereign," and be "under the peace," that is to say, "under the protection of the king." But this position is inconsistent with the doctrine universally recognized, and afterwards admitted by the learned judge himself, that one who, standing out of the jurisdiction, shoots and kills a man within it, is indictable for the homicide where his shot strikes and kills. And in all the cases but one, cited in support of this position, both the stroke and the death took place out of the realm. In *Rex v. Sawyer*, 2 Car. & K. 101, S. C., Russ. & R. 294, it was held that a British subject might be tried in England under the statute

of 33 Hen. VIII., c. 23, for the murder of another British subject committed on land in a foreign independent kingdom, upon an indictment alleging that the person murdered was in the peace of the king, and that the murder was committed against the peace of the king. In *Regina v. Serra*, 2 Car. & K. 53, S. C., 1 Den. C. C. 104, it was held that a murder by a foreigner on a foreign ship, resulting in immediate death, was not triable in England. In *King v. Depardo*, 1 Taunt. 26, *Rex v. Helsham*, 4 Car. & P. 394, and *Rex v. Matto*, 7 Id. 458, it was held that a murder by a wound on land in a foreign country, of which the person wounded died there, or on board of a British ship, could not be punished in England without proof that the murderer was a British subject. The remaining case is that in which the killing of a man attainted by *præmunire*, and so out of the king's protection, was held not to be felony, for which are quoted 1 Hale P. C. 433, and Vin. Abr., tit. Murder, B, 3. But a reference to the original authorities there cited deprives the case of any weight. The statutes of *præmunire* declared any one attainted by *præmunire* to "be put out of the king's protection": State. 16 Rich. II., c. 5; 24 Hen. VIII., c. 12, sec. 4. And it is therefore said to have been held in Parliament, in 24 Hen. VIII., that the killing of such a person was not felony, because it was "as if he was out of the kingdom and power of the king": Bro. Abr., tit. Corone, 197. But within thirty years afterwards it was declared by the statute of 5 Eliz., c. 1, sec. 18, that this was doubtful, and that it should be unlawful to kill such a person, "any law or statute, or opinion or exposition of any law or statute, to the contrary, in any wise notwithstanding."

It is further asserted that "there are very high authorities for saying that at common law a trial might always be had in the county where the mortal blow was given, for that alone is the act of the party, and the death is but a consequence"; for which are cited 1 East P. C. 361, 1 Hale P. C., 426, and 1 Bishop's Criminal Law, sec. 454. But both Lord Hale and Mr. East are speaking only of the "more common opinion" before the statute of 2 & 3 Edward VI., c. 24; and the words "that alone is the act of the party" are an addition of Mr. East, not to be found in Lord Hale, who immediately afterwards says: "On the other side, as to some respects, the law regards the death as the consummation of the crime, and not merely the stroke," of which he gives several illustrations, besides some already mentioned in the earlier part of this opinion.

The other authorities which Mr. Justice Campbell cites relate to the rule in cases of forfeiture for felony, the form of indictments against abettors, and the effect of a pardon between the blow and the death. The learned judge says that "perhaps the most reliable rule can be drawn from the decisions relating to forfeitures for felony." It is true that the books state that the escheat of the land of a murderer related to the time of the mortal wound, and not merely to that of the death; but this was only to avoid intervening alienations or encumbrances by the felon: 1 Hale P. C. 360, 426, 591; Vin. Abr., tit. Forfeiture, R. It is also true that, where the stroke and the death are laid on different days, the abetment, if laid specially, should be applied to the stroke, and not to the death; but an allegation that the abettors were present aiding and abetting at the time of the murder committed,—to wit, on the first day,—is fatally repugnant, for the reason that until the death no murder was committed: 1 Starkie on Criminal Pleading, 82; *Heydon's Case*, 4 Coke, 42. If the ruling of Mr. Justice Patteson in *Rex v. Hargrave*, 5 Car. & P. 170, that an indictment for manslaughter was good, which charged that the mortal blow was given in one county and the person stricken languished and died in another, and the defendant "was then and there present, aiding and abetting," etc., "in the commission of said felony," is consistent with this, the words attributed to him by the reporter, that "the giving of the blows which caused the death constitutes the felony," and that "the languishing is not any part of the offense," clearly are not. It was, indeed, held in *Cole's Case*, Plow. 401, that a general pardon after the mortal wound, and before the death, was a bar to an indictment for the murder. But that was not because the felony was committed at the time of the wound, and before the death, but "because the wound given by the prisoner was the cause of the felony, the giving of which wound was an offense and misdemeanor against the queen, and that being pardoned by the act, all the consequences that followed from the said offense are also pardoned thereby." And it is settled by later authorities that a pardon or conviction of the assault before the death is no bar to an indictment for the murder after the death has completed the greater crime: *Nicholas's Case*, Fost. 64; *Commonwealth v. Roby*, 12 Pick. 496; *Queen v. Morris*, L. R. C. C. 90.

The most plausible form of the argument against the jurisdiction is, that the coming into the state is the act, not of the

wrong-doer, but of the injured person, and therefore should not subject the former to the jurisdiction, merely because the latter happens to die there. But it is the nature and the right of every man to move about at his pleasure, except so far as restrained by law; and whoever gives him a mortal blow assumes the risk of this, and in the view of the law, as in that of morals, takes his life wherever he happens to die of that wound; and may be there punished if the laws of the country have been so framed as to cover such a case.

In *State v. Carter*, 27 N. J. L. 499, the supreme court of New Jersey held that a man could not be indicted in that state for manslaughter by mortal bruises given in New York, of which the person injured died in New Jersey. But the only statute of that state upon the subject, as was observed by Mr. Justice Vredenburg in delivering the judgment of the court, evidently relates to murder only, and not to manslaughter. His remarks upon the power of the legislature of New Jersey to provide for the punishment of such a case are therefore purely *obiter dicta*; and they are unsupported by any reference to authorities, and present no considerations which require further discussion.

Grosvenor v. St. Augustine, 12 East, 244, was not a criminal case, but in the nature of an action against the hundred on the statute of 19 Geo. II., c. 34, sec. 6, which provided that if any officer of the revenue should be beaten, wounded, maimed, or killed by a smuggler, the inhabitants of the lathe, in such counties as were divided into lathes, and in other counties the inhabitants of the hundred, "where such fact shall be committed," should pay all damages suffered by such beating, wounding, or maiming, and one hundred pounds to the executor or administrator of each person so killed. It was, indeed, held that this penalty might be recovered by the executor of a revenue officer who received a mortal wound in a boat between high and low water mark, of which he afterwards died on the high sea, by a shot fired from the shore within the lathe. But that was upon the construction of the particular statute, as appears from Lord Ellenborough's judgment. "The shot which produced the death, having been fired from the shore within the lathe, brings the case within the fair meaning of the act, the object of which was to make the inhabitants of that place where the act was done which caused the death answerable for it, in order to interest them in repressing the offenses against which the act was leveled." All

the authorities agree that the mere fact of the shot being fired from the shore would not give the courts of common law jurisdiction of an indictment for homicide: *Rex v. Coombes*, 2 Leach, 4th ed., 388; 2 Chalmers's Opinions, 217; *United States v. Davis*, 2 Sum. 485.

The learned counsel for the defendants much relied on the case of *Regina v. Lewis*, Dears. & B. 182; S. C., 7 Cox C. C. 277. That was an indictment on the statute of 9 Geo. IV., c. 31, sec. 8, which was held not to cover the case of a foreigner dying in England from injuries inflicted by another foreigner in a foreign vessel upon the high seas. But although at the argument two of the judges, Mr. Justice Coleridge and Mr. Baron Martin, expressed doubts whether Parliament could legislate for the punishment of such a crime, none of the judges, except Mr. Justice Crompton, denied the power; Lord Chief Justice Cockburn suggested that the section under which the indictment was found, taken in connection with the next preceding section relating to murder or manslaughter in a foreign country, which was in terms limited to British subjects, must be equally limited; and after advisement, the opinion of the court was put upon that ground only. The case of *Nga Hoong v. Queen*, 7 Cox C. C. 489, was decided upon like considerations. Both of those cases, therefore, merely held that the whole tenor of the statute in question showed that it was not intended to cover cases of foreigners sailing on the high seas under a foreign flag; applying the same rule of construction as the supreme court of the United States, in *United States v. Palmer*, 3 Wheat. 631-634, and *United States v. Pirates*, 5 Id. 195-197. Whether an explicit statute of the state where a murdered man dies will warrant the indictment and trial of his murderer, if found within the jurisdiction, is quite a different question.

Neither of the statutes of the commonwealth upon this subject has ever contained any words limiting the description of the persons by whom the offense might be committed; and the existing statute clearly manifests the intention of the legislature to punish all who, without legal justification, cause the death of any person within the commonwealth, wherever the first wrongful act is done, or of whatever country the wrong-doer is a citizen. The power of the commonwealth to punish the causing of death within its jurisdiction is wholly independent of the power of the United States, or of the nation to which the vessel belongs, to punish the inflicting of the in-

jury on the high seas. And upon full consideration, the court is unanimously of opinion that there is nothing in the constitution or laws of the United States, the law of nations, or the constitution of the commonwealth, to restrain the legislature from enacting such a statute.

The other objections of the defendants may be more briefly disposed of. The only ones insisted on in argument were, that the statute included, among the causes of death, nothing but poison, and blows, or other violent acts, and not injuries by exposure, starvation, or neglect; that the indictment should have alleged in terms that the wounds and other causes of death therein mentioned were "mortal"; that it was bad for duplicity, because it charged a beating, an exposure, and a starving, as the means of death; that if not bad for duplicity, all the co-operating causes alleged must be proved; and that the defendants could not be charged and convicted of manslaughter by reason of an injury done by one of them to the deceased on one day, and another injury done to him by another of them on a different day. The court is of opinion that neither of these objections can be sustained.

The language of the statutes of Massachusetts upon this subject is not, like that of the English statutes, limited to the cases of a blow struck or poison given, but would seem to have been carefully framed, in the light of *Hood's Case*, Rec. 1795, fol. 216, before cited, to exclude the construction contended for. The statute of 1879 enumerated as causes of death, "stroke, poisoning, or injury," and the later re-enactments speak of a mortal wound given, "or other violence or injury inflicted," or poison administered. "Inflict" does not necessarily imply direct violence. There is no more appropriate use of the word "inflict" than in connection with punishment; and "to inflict punishment" clearly includes imprisonment and involuntary restraint, as well as hanging, beheading, or whipping. We can have no doubt that any bodily harm which is caused to be suffered by the act of the accused is an "injury inflicted," within the meaning of the statute.

The objections to the form of the indictment are both answered by the consideration that it is not framed upon the theory that either of the means alleged alone was necessarily the cause of the death, but upon the theory that the blows, the starving, and the exposure co-operated to produce it. In such a case, it is abundantly established by precedents that it is sufficient to allege that the death resulted from all these

means, without otherwise alleging either of them to have been mortal, and to prove that it resulted from all or any of them: 2 West's Symb., secs. 301, 308; *Weston's Case*, 3 Inst. 50, 135; *Jackson's Case*, 18 How. St. Tr. 1075, 1111; 2 Hawk., c. 23, sec. 83; *King v. Clark*, 1 Brod. & B. 473; *Commonwealth v. Stafford*, 12 Cush. 619. The only color for the position that all the co-operating causes alleged as tending to one result must be proved is to be found in the doubt of one learned judge, and the dictum of another, at *nisi prius*: *Stockdale's Case*, 2 Lew. C. C. 220; *Rex v. Saunders*, 7 Car. & P. 277.

The instructions given to the jury in this case did not allow them to convict any one of the defendants who did not take part in the act or acts which they found to have caused the death, and were more favorable to the defendants than the charge of Sir Michael Foster in *Jackson's Case*, above cited.

Exceptions overruled.

IF SHOT FIRED IN ONE STATE WOUND OR KILL MAN IN ANOTHER STATE, the offender may be tried and convicted in the latter state: *People v. Adams*, 45 Am. Dec. 468.

CRIMINAL HOMICIDE: See note to *Commonwealth v. Webster*, 52 Am. Dec. 736.

DUPPLICITY, WHAT CONSTITUTES: See note to *Ben v. State*, 58 Am. Dec. 239, 244, 246.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: If a thief take into Massachusetts property stolen in another state, it is a new taking and asportation in the former state, and he may there be indicted for larceny of the property: *Commonwealth v. White*, 123 Mass. 433. If a man incites an insane person, or a child, or an innocent agent, to commit a larceny in his absence, he is liable to the same extent as if personally present at the commission of the crime; and this is so, even if he was all the time in another jurisdiction: *Id.* 434. An indictment for manslaughter, by causing the clothes of the person killed to be saturated with kerosene, need not allege that the accused knew of the deadly tendency of the kerosene, or that it was of a dangerous tendency. It is enough to allege the assault, and that death did in fact result from it. Similar allegations would be superfluous in the case of an assault with a staff, or where the death resulted from assault combined with exposure: *Commonwealth v. Pierce*, 138 Id. 181. One who, in one county or state, employs an innocent agent in another to commit a crime, is liable in the latter county or state: *Lindsey v. State*, 38 Ohio St. 512. An accessory is equally liable under Massachusetts statutes, though he was not at the time of the commission of the crime in the same county, or even within that commonwealth: *Commonwealth v. Chiovaro*, 129 Mass. 497; *Commonwealth v. Pettes*, 114 Id. 311. The act of the accessory is by intentment of law committed in the county where the crime was committed by the principal, and may be so alleged in the indictment: See case last cited. Even in trials for murder a misdescription of the weapon with which the fatal wound was given is unimportant, if the mode of death proved agrees in substance with that charged; as, for instance, in the case of

a wound alleged to be with a sword, but shown to have been made with an ax; or a blow described as made with a staff, shown to have been with a stone; and the same if the death be laid to be by one sort of poisoning, and in truth it be by another: *Commonwealth v. McLaughlin*, 105 Id. 464.

THAYER v. THAYER.

[101 MASSACHUSETTS, 111.]

EVIDENCE OF ACTS OF ADULTERY BETWEEN LIBELEES AND HIS PARAMOUR, COMMITTED AFTER FILING OF LIBEL FOR DIVORCE against him by his wife, is competent to show the nature of the intercourse between them at the time when the adultery charged in the libel is alleged to have been committed.

LIBEL for divorce on the ground of adultery with Mrs. Parmelee, who had lived in the family of the parties herein for three years next prior to the filing of the libel. Acts of familiarity, close intimacy, and circumstances of suspicion were shown in reference to the conduct of the libelee and Mrs. Parmelee towards each other. Libellant was permitted, against the objections of libelee, to show the continuance of such relations after the filing of the libel, and that their associations had been adulterous.

D. S. Richardson, for the libellant.

J. C. Kimball, for the libelee.

By Court, COLT, J. The libelee, in support of his objection to the testimony which was admitted to prove adultery on several other occasions, since the date of the libel, out of the limits of the commonwealth, relies upon the case of *Commonwealth v. Horton*, 2 Gray, 354. It was there held, upon the trial of an indictment for adultery with a person named, that evidence of subsequent cohabitation in another county was not admissible. This decision was by a majority of the court. It is put upon the familiar principle in criminal law, that evidence tending to prove a similar but distinct offense, for the purpose of raising an inference or presumption that the accused committed the particular act with which he is charged, is not admissible. The case cited was followed by *Commonwealth v. Thrasher*, 11 Id. 450, where it is broadly laid down that acts of improper familiarity, amounting to adultery, between the same parties, before the time relied on as the time of the commission of the adultery charged, is inadmissible, either in corroboration of the witnesses for the commonwealth,

or to show the disposition of the parties to commit the crime. Both these cases follow and approve *Commonwealth v. Merriam*, 14 Pick. 518 [25 Am. Dec. 420], where it was held that other instances of improper familiarity between the defendant and the same woman might be given in evidence to corroborate the witness; but both reject such evidence where it tends to show a substantial act of adultery on a different occasion.

If these two cases are to be regarded as stating the true rule which governs the admission of this kind of evidence, then the defendant's objection is well taken. In the opinion of the court, there is in each case a plain misapplication of the rules of evidence to the facts presented.

The evidence by which the act of adultery is proved is seldom direct. The natural secrecy of the act makes it ordinarily impossible to prove it, except by circumstantial evidence. The circumstances must be such, indeed, as "to lead the guarded discretion of a reasonable and just man to the conclusion of guilt." But when adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place. The intent and disposition of the parties towards each other must give character to their relations, and can only be ascertained, as all moral qualities are, from the acts and declarations of the parties. It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it. The rules which govern human conduct, and which are known to common observation and experience, are to be applied in these cases, as in all other investigations of fact.

An adulterous disposition existing in two persons towards each other is commonly of gradual development; it must have some duration, and does not suddenly subside. When once shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanency which justifies the inference of its existence, at any particular point of time, from facts illustrating the preceding or subsequent relations of the parties. The rule is, that a condition

once proved is presumed to have been produced by causes operating in the usual way, and to have continuance till the contrary be shown.

The limit practically to the evidence under consideration is, that it must be sufficiently significant in character, and sufficiently near in point of time, to have a tendency "to lead the guarded discretion of a reasonable and just man" to a belief in the existence of this important element in the fact to be proved. If too remote or insignificant, it will be rejected, in the discretion of the judge who tries the case. The fact that the conduct relied on has occurred since the filing of the libel does not exclude it; and proof of the continuance of the same questionable relations during the intervening time, as in the case at bar, will add to its weight.

It is noticeable that, while both of the cases first named are placed upon the same rule of evidence in criminal proceedings, they both recognize the principles here stated, and also the exception to the rule, which permits the proof of a distinct offense, when such evidence tends to establish an element in the crime charged, as when guilty knowledge or some particular criminal intent is to be shown. But by the application of the rule laid down in these cases, evidence tending to establish an independent crime is to be rejected, although all acts which are only acts of improper familiarity are to be admitted in proof. There is no sound distinction to be thus drawn. There is no difference between acts of familiarity and actual adultery committed, when offered for the purpose indicated, except in the additional weight and significance of the latter fact. The concurrent adulterous disposition of the defendant and the *particeps criminis* cannot be shown by stronger evidence than the criminal act itself. There is no one act by which the moral *status* of the parties is more clearly defined. And for the purposes and with the limitations here stated, evidence of it is always admissible: *Boody v. Boody*, 30 L. J., N. S., Prob. & Adm. 23; *Commonwealth v. Lahey*, 14 Gray, 91; *Commonwealth v. Pierce*, 11 Id. 447.

Decree affirmed.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: In libels for divorce, or in an indictment for adultery, evidence is admissible of improper familiarities, other than those alleged, between the parties, whether before — *Pond v. Pond*, 132 Mass. 223; *Commonwealth v. Jackson*, 132 Id. 19; *Parker v. Dudley*, 118 Id. 604; *Commonwealth v. Nichols*, 114 Id. 288; *Beers v. Jackman*, 103 Id. 194; *State v. Markins*,

95 Ind. 468 — or after the act charged in the indictment: See last two cases cited; *Pond v. Pond*, 132 Mass. 223. The principal case was quoted from in *State v. Markins*, 95 Ind. 468; *Commonwealth v. Abbott*, 130 Mass. 474. In an action for slander or libel, the uttering or publishing of similar words, or of words of a similar import, or declarations upon the same subject, or referring to the publication complained of, may be admitted in evidence upon the issue of actual malice; but evidence of a distinct and different calumny is inadmissible; and if the other publications were criminally libelous, this would not prevent their admission as evidence of malice, if otherwise admissible: *Commonwealth v. Damon*, 136 Id. 448. On the trial of an indictment for the malicious burning of a building, after it has appeared that the defendant had conveyed the building to his sons, subject to a mortgage made by him, they assuming to pay the mortgage note, evidence that a month before the fire the defendant suggested to an insurance broker that there should be an increase of insurance on the building is admissible to show that he had a motive to commit the offense: *Commonwealth v. Bradford*, 126 Id. 45. So on an indictment for an assault to commit a rape, acts of the defendant which have some tendency to show a continuing lustful purpose, and tending to show the intent with which the assault was committed, are admissible: *Commonwealth v. Bean*, 137 Id. 571.

WELCH v. WILCOX.

[101 MASSACHUSETTS, 102.]

UNDER GRANT OF PASSAGE-WAY, "AS NOW LAID OUT," OWNER OF LAND OVER WHICH WAY PASSES CANNOT MAINTAIN GATE THEREON, NOR CAN HE NARROW THE WAY BY PLANTING POSTS THEREIN.

TORT for cutting down and removing a gate from a passage-way on plaintiff's land, over which defendant had a right to pass, under a grant from one Langmaid, a former owner. At the time of such conveyance, there was no gate upon the way, and it was a custom in the city to maintain no gate upon such ways, but to leave them opening upon the street. Plaintiff erected the gate, against defendant's objection, at the end of the passage-way next to the street. It and the necessary posts narrowed the way three inches. If plaintiff had a right to erect it, the gate was a suitable one. The question submitted was, whether the plaintiff had a right to maintain the gate.

A. Jackson, for the plaintiff.

C. Robinson, Jr., for the defendant.

By Court, COLT, J. Under the deed of Langmaid, a right was granted the defendant to the use of a passage-way, as then laid out over the grantor's land. The plaintiff claims under Langmaid by a subsequent deed, which conveys the land, reserving to the owners of the defendant's lot a right to

a three-foot passage-way, as laid out on the premises conveyed. It does not appear in what manner the way was laid out, but we must infer that it was by some well-marked boundaries known and recognized by both parties. There was no gate separating the passage-way from the street at the time of these conveyances, and in the opinion of the court, the plaintiff has no right to erect and maintain a gate at the entrance of said passage-way, or to narrow the way as described.

If the obstruction in the way had existed at the time of the deed to the defendant, or even if it had been shown that similar passage-ways were usually so closed, the plaintiff's claim would stand on stronger ground, for it may well be presumed that the parties to the grant were acquainted with the public usages, and created this easement with reference to those usages. The plaintiff, as owner of the soil, has a right to all the reasonable and beneficial use of the way which he can make, consistently with the enjoyment of the easement, and the use which others similarly situated make of their land is evidence of a reasonable use. This decision is not embarrassed by these suggestions, because there was no evidence of usage offered by the plaintiff.

This case is clearly distinguished from *Atkins v. Bordman*, 2 Met. 457, 467. The doctrine of that case is, "that when no actually existing way, as bounded and located, is granted or reserved, the way, in point of width and height, shall be such as is reasonably necessary and convenient for the purposes for which it is granted." The dimensions of the way were there held not to be expressed, and to be controlled by the purpose for which it was reserved.

When the way is defined, as in the case at bar, the construction we give is, in the words of Shaw, C. J., "necessary to the security of both parties: to the grantee, to insure him a way of known width and dimension, the sufficiency of which he may judge of before he closes his contract for the purchase; and to the grantor, to secure himself against the claim of the grantee to an indefinite right to pass over his premises": *Salisbury v. Andrews*, 19 Pick. 250, 258; *O'Linda v. Lothrop*, 21 Id. 292; *Underwood v. Carney*, 1 Cush. 285, 292.

By the agreement of the parties, the entry must be judgment for the defendant.

THE PRINCIPAL CASE WAS CITED in *Dickinson v. Whiting*, 141 Mass. 417, to the point that where a way was granted "for the convenient occupation"

of the premises conveyed, the grantee was entitled to all the convenience which the way, as it then existed, could afford in the management of the farm on which it bounded.

WAYS, AND RIGHTS AND REMEDIES OF PARTIES ENTITLED THERETO. —

1. CLASSIFICATION AND NATURE OF WAYS. — A way is the right of one man to pass over the land of another in some particular line. A way *ex vi termini* imports a right of passing in a particular line: *Jones v. Percival*, 5 Pick. 484; *Jennison v. Walker*, 11 Gray, 426. And the course of a way, when once established, cannot be altered by either party without the consent of the other: See case last cited. There are foot-ways; foot-ways and horse-ways; foot, horse, and carriage ways; and drift-ways: Washburn on Easements and Servitudes, 254. A "carriage-way" always includes a "foot-way"; *Davies v. Stephens*, 5 Car. & P. 570. So it does a "horse-way," but not a "drift-way": *Ballard v. Dyson*, 1 Taunt. 284. A "drift-way" is a common way for driving cattle, and has been held to intend a way for the passage of teams: *Smith v. Ladd*, 41 Me. 314. A right to "lead" manure is a right to carry it in a cart, since "leading" implies "drawing in a carriage." And "a way" on foot, or for horses, oxen, cattle, and sheep, does not give one a right to carry manure in a wheel-barrow, although he who wheels it travels on foot: *Brunton v. Hall*, 1 Q. B. 792. A grant of "a way" over one's premises will be understood to be a general way for all purposes; and a right of way granted or reserved without limit of use may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted: *Abbott v. Butler*, 59 N. H. 317; *Walker v. Pierce*, 38 Vt. 94. But the grantee of a right of way takes it subject to all restrictions which the grantor has imposed, and can use it for no other purpose than that provided in the grant: *French v. Marston*, 24 N. H. 440; S. C., 57 Am. Dec. 294. This point is fully discussed in the extended note to *Bakeman v. Talbot*, 88 Am. Dec. 279-282, on use of private ways. The words "road" and "way" are not synonymous. A road is any piece of land used or appropriated for travel, and is a very different thing from a mere right of way: *Chollar-Potosi M'g Co. v. Kennedy*, 3 Nev. 361; S. C., 93 Am. Dec. 409. A right of way as a mere rural servitude is confined to a convenient passage from the property granted to the public road or highway: *Livingston v. Mayor etc. of New York*, 22 Am. Dec. 622. A way is an incorporeal hereditament, and consists in the right of passing over another's ground: Washburn on Easements and Servitudes, 256. It may arise either from grant, necessity, or prescription: *Lawton v. Rivers*, 2 McCord, 445; S. C., 13 Am. Dec. 741; *Derrickson v. Springer*, 5 Harr. (Del.) 21; and is either in gross or appendant to land. The first is attached to and vests the right in the person to whom it is granted. The second is incident to an estate, one terminus of which is the land or tenement of the person claiming it; it inheres in the land, concerns the premises, and pertains to its enjoyment, and passes with it: *Alley v. Carleton*, 29 Tex. 74; S. C., 94 Am. Dec. 260; *Louisville etc. R. R. Co. v. Koelle*, 104 Ill. 455; *Potter v. Iselin*, 31 Hun, 134; *Kramer v. Knauff*, 12 Ill. App. 115; *Garrison v. Rudd*, 19 Ill. 558; *Gunsow v. Healy*, 100 Pa. St. 42; *Dennis v. Wilson*, 107 Mass. 591. But a way is never presumed to be in gross when it can fairly be construed to be appurtenant to the land: *Kramer v. Knauff*, 12 Ill. App. 115; *Louisville etc. R. R. Co.*, 104 Ill. 455; *Alley v. Carleton*, 29 Tex. 74; S. C., 94 Am. Dec. 260. There is, however, no incompatibility in the grant of a right of way to several persons, and which confers a right appurtenant as to some of the grantees, and in gross as to others, for such a grant may be in part appurtenant, and partly in gross: *Louisville etc. v. Koelle*, 104 Ill. 455. A grant of a right of way in

gross is personal to the grantee, and incapable of assignment; but if it is appurtenant to other lands, or an estate, it is the subject of transfer, and will pass by a conveyance of the estate to which it is appurtenant: *Id.*; *Alley v. Carleton*, 29 Tex. 74; S. C., 94 Am. Dec. 260. The general rules of law which govern the rights and obligations of the owners of dominant and servient estates apply as well to subterranean rights of way as to those upon the surface: *Pomeroy v. Salt Co.*, 37 Ohio St. 520. A way appendant cannot be turned into one in gross, because it is inseparably united to the land to which it is incident. So a way in gross cannot be granted over to another because of its being attached to the person: *Garrison v. Rudd*, 19 Ill. 553, 565; *Alley v. Carleton*, 29 Tex. 74; S. C., 94 Am. Dec. 260. One cannot have a private way over and along a public highway: *State v. Jescoat*, 11 Rich. 529; *Bailey v. Culver*, 84 Mo. 531. The grant of a way across a man's land conveys no right to the soil, rocks, or other things within the bounds of the way: *Jamaica Pond etc. Corporation v. Chandler*, 9 Allen, 164; *Lyman v. Arnold*, 5 Mason, 198.

2. WAYS BY NECESSITY, AND BY PRESCRIPTION — RIGHT OF WAY WHEN APPURTENANT TO LAND — RIGHT TO MAINTAIN FENCE OR BARS AT END OF PRIVATE WAY. — A "way of necessity" extends only to a single track or way: *McDonald v. Lindall*, 3 Rawle, 492. The subject of ways by necessity is fully discussed in the note to *Pettingill v. Porter*, 85 Am. Dec. 675-681; see also *Tracy v. Atherton*, 82 Id. 621; *Alley v. Carleton*, 94 Id. 260, note 264; *Galloway v. Bonester*, 65 Wis. 79; S. C., 56 Am. Rep. 616. As to the acquisition of right of way by prescription: *Hill v. Crosby*, 13 Am. Dec. 448; *Turnbull v. Rivers*, 15 Id. 622; *Rowland v. Wolfe*, 19 Id. 651; *Worrall v. Rhoads*, 30 Id. 274, note 278; *Valentine v. Boston*, 33 Id. 711, note 714; *Pierce v. Cloud*, 82 Id. 496, note 498; *Chollar-Potosi Mining Co. v. Kennedy*, 93 Id. 409. To establish a right of way by prescription there must be, — 1. Continued and uninterrupted use or enjoyment; 2. Identity of the thing enjoyed; 3. That the right is adverse to the owner of the soil: *Lawton v. Rivers*, 13 Id. 741; *Cox v. Forrest*, 60 Md. 74; *Aaron v. Gunnels*, 68 Ga. 528. Mere frequency of passage across one's land, not continuing in the same track for the requisite time, and with no repairs or work done on the alleged way, will not suffice: See case last cited. But the law does not mean by "an uninterrupted and continuous enjoyment" that a person shall use the way every day for twenty years. It simply means that he shall exercise the right more or less frequently, according to the nature of the use to which its enjoyment may be applied, and without objection on the part of the owner of the land, and under such circumstances as preclude the presumption of a voluntary abandonment on the part of the person claiming it. Nor does the law mean by "exclusive" that the right of way must be used by one person only, but simply that the right of way should not depend for its enjoyment upon a similar right in others, and that the party claiming it exercises it under some claim existing in his favor, independent of all others. It must be exclusive as against the right of the community at large. The use of a way over the land of another, whenever one sees fit, and without asking leave, is an adverse use, and the burden is upon the owner of the land to show that the use of the way was by license or contract, inconsistent with a claim of right. And in an action to recover damages for the obstruction of a private right of way claimed over the land of defendant, it is necessary, in the absence of an express grant, for the plaintiff to prove an adverse, exclusive, and uninterrupted enjoyment of the right of way for twenty years. In support of the above propositions, see *Cox v. Forrest*, 60 Md. 74. The owner of land adjoining a railroad may ac-

quire a right to a private way across the railroad by twenty years' use thereof: *Fisher v. New York etc. R. R. Co.*, 135 Mass. 107; *Gay v. Boston etc. R. R. Co.*, 141 Id. 408. In *Screen v. Gregorie*, 8 Rich. 158, S. C., 64 Am. Dec. 747, it was held that a right of way is not incident to a grant, unless there be an actual necessity, and not a mere convenience; but in *Cheswell v. Chapman*, 38 N. H. 14, S. C., 75 Am. Dec. 158, it is held that a right of way is appurtenant to land, and that the right to possession and use of land carries with it the right to use the way; and in *Lide v. Hadley*, 36 Ala. 627, S. C., 76 Am. Dec. 338, a right of way to land devised over other land of the testator was held to be appurtenant to the land devised, and passed by a conveyance thereof without express mention. A way appurtenant to a close is appurtenant to every parcel into which it may be divided: *Whitney v. Lee*, 1 Allen, 198; S. C., 79 Am. Dec. 727. But on the general question as to whether an easement in way is implied on a severance of the heritage, see extended note to *Elliott v. Rhett*, 57 Am. Dec. 766, where the subject is discussed; *Goodal v. Godfrey*, 53 Vt. 219; S. C., 38 Am. Rep. 671; *Mitchell v. Seipel*, 53 Md. 251; S. C., 36 Am. Rep. 404, extended note thereto 415-422, discussing the question.

Land may pass, in a deed, as appurtenant to land; and where land is granted with a right of way, the right is appurtenant to any part of the land, and the grantee of any part of the land is entitled to it: *Case of Private Road*, 1 Ashm. 417; *Watson v. Bioren*, 1 Serg. & R. 227; but if a party have a right of way appurtenant to land, he cannot, by attaching other land to it, use this way to pass through all: *Case of Private Road*, 1 Ashm. 417. Private ways are in the nature of covenants running with the land, and are never presumed to be personal, when they can be construed to be appurtenant to the land. For instances of deed, where such easements have been construed to be appurtenant to the land conveyed, see *Taylor v. Dyches*, 69 Ga. 455; *Dennis v. Wilson*, 107 Mass. 591; *Gunson v. Healy*, 100 Pa. St. 42; *Regan v. Boston Gas Light Co.*, 137 Mass. 37; *Kramer v. Knauff*, 12 Ill. App. 115; *Potter v. Iselin*, 31 Hun, 134; *Louisville etc. R. R. Co. v. Koelle*, 104 Ill. 455. For instance, in which a right of way has been held not to be appurtenant to the land conveyed, see *Warren v. Blake*, 89 Am. Dec. 748; *Barker v. Clark*, 17 Id. 428. Nothing passes as incident to a grant of a right of way over the land of another, except what is necessary for its reasonable and proper enjoyment: *Maxwell v. McAtee*, 48 Id. 409. A right of way, however, is not incident to a grant, unless there be an actual necessity, and not a mere inconvenience: See *Alley v. Carleton*, 29 Tex. 74; S. C., 94 Am. Dec. 260, note 264; *Carey v. Rae*, 58 Cal. 159; but where the necessity exists, a right of way by necessity may be implied: See *Alley v. Carleton*, *supra*; *Regan v. Boston Gas Light Co.*, 137 Mass. 37; *O'Rourke v. Smith*, 11 R. I. 259; S. C., 23 Am. Rep. 440, and note thereto 446, 447. As to right of way after partition, see *Cheswell v. Chapman*, 38 N. H. 14; S. C., 75 Am. Dec. 158; *Carey v. Rae*, 58 Cal. 159. Where one grants a right of way across his land, he may shut the termini of the same by gates, which the grantee must open and close when using the same, unless an open way is expressly granted: *Maxwell v. McAtee*, 9 B. Mon. 20; S. C., 48 Am. Dec. 409; *Bean v. Coleman*, 44 N. H. 544; *Bakeman v. Talbot*, 31 N. Y. 369. The grant of a way across one's land does not imply that it is to be open and free from gates, unless the nature of the use to which it is to be applied indicates thereby that it should be open and unobstructed: *Maxwell v. McAtee*, 9 B. Mon. 20; S. C., 48 Am. Dec. 409; *Garland v. Furber*, 47 N. H. 304; and where the grant was of "a free and obstructed way," it was held that the owner of the land might maintain

gates across it, unless this would be inconsistent with the purposes for which the way was granted: See case last cited. But upon a consideration of the facts in *Devore v. Ellis*, 62 Iowa, 506, where the plaintiff had purchased a private way from his farm to the highway, it was held that he was entitled to have the way kept open, and that defendants, the owners of the adjoining lands, should be restrained from maintaining a fence and gate across the way where it entered the highway: See also *Dickinson v. Whiting*, 41 Mass. 414.

In another case the court held that the right to maintain gates or bars at either end of a private way, by the land-owner, exists, unless the same unreasonably and unnecessarily obstructs the owner of the way in the use of it, where there is nothing in the terms of the grant to restrict this: *Houpes v. Alderson*, 22 Iowa, 162. So in *Baker v. Frick*, 45 Md. 337, S. C., 24 Am. Rep. 506, it was held that the grantor of a private way over his lands is not debarred from erecting gates across the way, provided they do not interfere with a reasonable and proper enjoyment of the way; and that whether they do or not is a question for the jury. If the owner of the easement pulls down gates properly put across the way, this act does not give the land-owner a right to obstruct the way: *McMillan v. Cronin*, 75 N. Y. 474. So if the way had been laid out and was open when granted, and the grant was of "a way as now laid out," the grantor would not be at liberty to close its entrance with bars or gates: See principal case. If a way without gates has been gained by prescription, the land-owner cannot afterwards put up gates: *Shivers v. Shivers*, 32 N. J. Eq. 578. Where a way was granted, and in the grant it was said that "it shall not be subject to have any frame or building erected thereon," it was held to be a grant of a way open and unobstructed by any building over it, and that it must be kept open to the sky: *Schworer v. Boylston Market Ass'n*, 99 Mass. 285. A right of way, whether by grant or prescription, carries with it, as incident thereto, a right to make necessary repairs and to remove all obstacles to its enjoyment: *McMillan v. Cronin*, 75 N. Y. 474. The obstruction of a way by the erection of a gate thereon, which may be opened and shut at pleasure, is not such an obstruction as will operate to extinguish the claimant's right of way, however long it may have been continued: *Barnwell v. Magrath*, 36 Am. Dec. 254. Under a deed not including a passage-way, where the grantee was informed that the right of way did not pass, and where the grantee sold to the plaintiff, who saw the premises, but had no assurance from the original owner, it was held that the original owner might close or obstruct the way: *McPherson v. Acker*, MacArth. & Mack. 150; S. C., 48 Am. Rep. 749. In *Bakeman v. Talbot*, 31 N. Y. 372, it was held that the grantee of a private way is bound to keep it in repair, and that he cannot deviate from it and go upon another part of the grantor's lands when it becomes impassable by floods, or otherwise; but where the way commonly used is closed by the act of the owner of the land, the way not being limited or defined, the one having the easement may pass to and fro in the manner least prejudicial to the owner: *Farnum v. Platt*, 8 Pick. 339; S. C., 19 Am. Dec. 330. So if a private way be unlawfully obstructed by the owner of the adjoining land, a person entitled to use the way may pass over the adjoining close, so far as may be necessary to avoid the obstructions, taking care to do no unnecessary damage: *Kent v. Judkins*, 53 Me. 160; S. C., 87 Am. Dec. 544; *Haley v. Colcord*, 59 N. H. 7; S. C., 47 Am. Rep. 176.

3. RIGHTS OF LAND-OWNER AND WAY-OWNER IN LAND. — The land-owner may do anything which is not injurious to the owner of the way; and if the land-owner is not restrained by the terms of the grant of the right of way

across his lands for agricultural purposes, he may maintain fences across such way, if provided with suitable bars or gates for the convenience of the owner of the way. He is not obliged to leave it as an open way, nor to provide swing-gates, if a reasonably convenient mode of passage is furnished: *Bakeman v. Talbot*, 31 N. Y. 366; *Bean v. Coleman*, 44 N. H. 539; *Maxwell v. McAtee*, 9 B. Mon. 20; S. C., 48 Am. Dec. 409; *State v. Pettis*, 7 Rich. 390; *Huson v. Young*, 4 Lans. 63; *Underwood v. Carney*, 1 Cush. 292. The owner of land adjoining a way may dig cellars by the side of it, if in towns or cities, and may lay building materials thereon, if he takes care not to improperly obstruct the same, and removes the materials within a reasonable time: *O'Linda v. Lothrop*, 21 Pick. 292. The land-owner may erect a building on each side of the way, and extending over it so as to make it a covered way, if he leaves a space so high, wide, and light that the way continues to be substantially as convenient as before for the purposes for which it is used. In case of a foot-path four feet wide, a height of eleven feet was held sufficient: *Gerrish v. Shattuck*, 132 Mass. 235; *Atkins v. Bordman*, 2 Met. 457. The land-owner has the same right to private ways as he has to public ways, and may maintain ejectment to recover the land. And if the way is discontinued, he holds it again free from encumbrance. He may sink a drain or a watercourse below the surface, if he do it so as not to deprive the public of their easement: *Perley v. Chandler*, 6 Mass. 454; *Green v. Chelsea*, 24 Pick. 71; *Pomeroy v. Ephraim*, 3 Vt. 279; *Adams v. Emerson*, 6 Pick. 67; *Atkins v. Bordman*, 2 Met. 457; *Tillmes v. Marsh*, 67 Pa. St. 507. The owner of land occupied by a highway may have trespass for entering upon the same, and digging into the side of it to widen the traveled part of it, though such act by a highway surveyor would be a lawful one: *Hollenbeck v. Rowley*, 8 Allen, 473. The grant of a parcel of land bounded upon a passage-way gives the grantee a right of way over the same, but not a right to take and carry away the materials thereof. But he would have a right to use the sand, gravel, stone, etc., within the passage-way, for grading, fitting, and repairing it: *Phillips v. Bowers*, 7 Gray, 21. A grant of a right of ingress and egress over land, and of fishing and fowling thereon, gives no right to take wood, grass, or any other thing properly appertaining to the ownership of the soil: *Emanus v. Turnbull*, 2 Johns. 313. Opening of way is not waste: *Pyncheon v. Stearns*, 11 Met. 304; S. C., 45 Am. Dec. 207. An indefinite right of way, or one not capable of determinate description, will not be established and protected by a court of chancery: *Fox v. Pierce*, 50 Mich. 500. As to how way may be extinguished, see *Barnwell v. Magrath*, 36 Am. Dec. 254; *Pearce v. McClenaghan*, 55 Id. 710; *Screven v. Gregorie*, 64 Id. 747; *Warren v. Blake*, 89 Id. 748; *Cox v. Forrest*, 60 Md. 74. Owner of right of way may recover damages for obstructions thereof: See *Alley v. Carleton*, 94 Am. Dec. 260; *Parker v. Boston etc. R. R.*, 50 Id. 709; or for closing it: *Boyd v. Achenbach*, 86 N. C. 397. As to measure of damages where way is obstructed, see *Rogers v. Stewart*, 26 Am. Dec. 296. As to easement in way, see extended note to *Ellott v. Rhett*, 57 Id. 766. As to ways by necessity, see extended note to *Pettingill v. Porter*, 85 Id. 675-681. As to use of private ways, see extended note to *Bakeman v. Talbot*, 88 Id. 279-282.

MERCHANTS' NATIONAL BANK v. NATIONAL EAGLE BANK.

[101 MASSACHUSETTS, 281.]

MONEY PAID TO HOLDER OF CHECK OR DRAFT DRAWN WITHOUT FUNDS may be recovered back, if paid by the drawee under a mistake of fact.

RULE OF CLEARING-HOUSE DOES NOT WORK FORFEITURE OF MONEY PAID ON CHECK WHEN. — The rule of a clearing-house association that a bad check is to be returned by the bank receiving it to the bank from which it was received, and in no case to be held after one o'clock, simply fixes a time at which payment of the check is to be considered complete; and a failure to return such a check by that time does not work a forfeiture of the money paid on it.

CONTRACT to recover the amount paid on a check by a mistake of fact. The facts are stated in the opinion.

S. Bartlett and D. Thaxter, for the plaintiffs.

C. B. Goodrich, for the defendants.

By Court, COLT, J. This action is brought by the plaintiffs to recover the amount of a check drawn upon them, and paid by them through the agency of the Boston clearing-house, there being no funds of the drawer in their hands at the time of the payment.

It is well settled by recent decisions that money paid to the holder of a check or draft drawn without funds may be recovered back, if paid by the drawee under a mistake of fact. And though the rule was originally subject to the limitation that it must be shown that the party seeking to recover back had been guilty of no negligence, it is now held that the plaintiff in such case is not precluded from recovery by laches in not availing himself of the means of knowledge in his power. It is otherwise, if the money is intentionally paid without reference to the truth or falsehood of the fact, and with the intention that the payee shall have the money at all events: *Appleton Bank v. McGilvray*, 4 Gray, 518 [64 Am. Dec. 92]; *Kelly v. Solari*, 9 Mees. & W. 54; *Townsend v. Crowdy*, 8 Com. B., N. S., 477. This right to recover back the money, however, will in no case be permitted to prejudice the payee who has suffered any damage or changed his situation in respect to his debtor by reason of the laches of the plaintiff, or his failure to return the check within a reasonable time.

It is plain, in the case here presented, that if the plaintiffs had paid this check at their own counter, under a mistake of

fact, they could have maintained this action to recover it back. Is there anything in the manner in which the payment was in fact made, or in the relation of the parties to each other as members of the clearing-house association, which prejudicially affects this right?

It is declared by the articles, which were signed by the plaintiff and defendant banks, to be the object of the association to effect, at one time and place, the daily exchanges between the several associated banks, and the payment of the balances resulting from such exchanges. An early hour is fixed for making these exchanges, and a later time in the day for the receipt and payment of balances from the debtor and creditor banks. These settlements are made, not from an examination in detail of the vouchers presented, but from memoranda and tickets accompanying them. And any mistakes resulting from this mode of settlement are to be adjusted directly between the banks which are parties therein. It is further provided that "whenever checks are sent through the clearing-house which are not good, they shall be returned by the banks receiving the same to the banks from which they were received, as soon as it shall be found that said checks are not good; and in no case shall they be retained after one o'clock." Under this arrangement, the payment required of the clearing-house to a creditor bank upon a check presented must be regarded as only provisional until the hour of one o'clock, to become complete only in case the check is not returned at that time. And if, by any mistake of fact, the return of the check is not so made, then, as between the two banks, it is to be treated as a payment made under a mistake of fact, precisely to the same extent, and with the same right to reclaim, which would have existed if the payment had been made by the simple act of passing the money across the counter directly to the payee on the presentation of the check. The manifest purpose of the provision is, to fix a time at which the creditor bank may be authorized to treat the check as paid, and be able to regulate with safety its relations to other parties.

We cannot adopt the theory that a failure to present a bad check, before the time named, to the bank sending it through the clearing-house, works an absolute forfeiture, and is in itself a perfect bar to any action to recover the amount of such check. The whole arrangement, in all its provisions and declared purposes, is to be construed together. And the law will not con-

strue any portion so as to subject parties to a penalty or forfeiture of their rights, where other reasonable interpretation can be given which will give effect and consistency to the whole. The parties have in terms affixed no penalty or forfeiture to the stipulation under consideration, and a failure to comply with its terms must leave the parties in the same position and precisely as they would stand when a payment is made under a mistake of fact in the ordinary way. After one o'clock, the defendants, upon the failure to return the check, had the right to consider it paid, and to treat it so in their dealings with others. The report finds that the delay in its return was occasioned by a mistake on the part of the messenger,—a mistake which was quite as much a mistake of fact as if it had been produced by the false time of a clock which was relied on. And no suggestion is made that there has been any change of circumstances, after the time when the defendants had a right to treat the check as paid, and before it was returned, which would now subject the defendants to damage or loss, and render it unjust for the plaintiffs to recover.

We have considered the case as if the agreement required the return of the check to the bank from which it was received before or at one o'clock; but it will be noticed that the stipulation is, that the check shall in no case be retained after one o'clock. If it were necessary to save a penalty or a forfeiture, it might be held that the delivery of it to a messenger before one o'clock, to be returned to the bank depositing it, with sufficient time, in the absence of any accident or mistake, to reach the bank before that hour, would be a compliance with its terms, although it was not in fact delivered until some minutes after.

Judgment on the verdict for the plaintiffs.

RECOVERY OF MONEY PAID UNDER MISTAKE OF FACT: See *Jordan v. Stevens*, 81 Am. Dec. 556; *Ellis v. Ohio etc. Trust Co.*, 64 Id. 610, note 631; *Baltimore etc. R. R. Co. v. Fawcett*, 46 Id. 655. As to overdrawn accounts, see *Rock River Bank v. Sherwood*, 78 Id. 669; note to *Bullard v. Randall*, 61 Id. 436.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Where money is paid by mistake and without neglect to a person who has no right to demand it, the party paying such money may recover back the amount: *Carpenter v. Northborough Nat. Bank*, 123 Mass. 70; *Boylston Nat. Bank v. Richardson*, 101 Id. 290; *National Bank v. Bangs*, 106 Id. 443; *National Ex. Bank v. National Bank*, 132 Id. 149; as where erroneous vouchers have been relied upon: *Stuart v. Sears*, 119 Id. 145. As to recovery of money paid by mistake by banks in clearing-house cases,

see *Manufacturers' Nat. Bank v. Thompson*, 129 Id. 439; *Merchants' Bank v. National Bank*, 139 Id. 518, 519; *National Ex. Bank v. National Bank etc.*, 132 Id. 149; *Preston v. Canadian Bank etc.*, 23 Fed. Rep. 179, all citing the principal case, and the last authority distinguishing it.

BURNHAM v. SEAVERNS.

[101 MASSACHUSETTS, 300.]

INFANT IS NOT LIABLE FOR MALICIOUS PROSECUTION OF SUIT DURING HIS INFANCY, where it was brought in his name by his *prochein ami*, and without his knowledge or authority, even though he expressly assented to the suit after he had knowledge of it.

TORT to recover damages for an alleged malicious prosecution of a civil action against the plaintiff by defendant, while a minor, by his next friend. The answer set up minority as a defense. There was proof at the trial tending to show that the action was brought without defendant's knowledge; that he took no part in conducting it; and that he knew of the action six weeks after it was commenced, but never interfered to prevent its prosecution until two years afterwards, when he caused it to be dismissed. The judge instructed the jury that if the action was brought without any authority from defendant, by his next friend, that the defendant was not responsible, even if, on hearing of it afterwards, he did not actively interfere to prevent it. Judgment for the defendant. Plaintiff alleged exceptions.

W. H. Towne, for the plaintiff.

E. M. Bigelow, for the defendant.

By Court, COLT, J. Under the finding of the jury, the alleged malicious suit was commenced entirely without the knowledge or authority of the defendant, who was, during its pendency, an infant. It was prosecuted by the *prochein ami*, in theory at least receiving his appointment from the court, and having sole control of the case, so long as he is allowed by the court to retain the place. The defendant had no power to prosecute or discontinue the suit during his minority: *Bac. Abr.*, tit. Infancy and Age, K, 2; *Guild v. Cranston*, 8 Cush. 506. If the infant expressly assented to the suit after he had knowledge of it, yet he cannot become a trespasser by such assent, being liable only for his own personal acts: 1 Chit. Pl., 6th ed., 76. The case of

Sterling v. Adams, 3 Day, 411, which bears some resemblance to this, differs in the fact that there the suit was prosecuted by the defendant after he became of age, though commenced before.

Exceptions overruled.

ATWOOD v. FISK. CURRANT v. FISK.

[101 MASSACHUSETTS, 363.]

BILL IN EQUITY WILL NOT LIE IN FAVOR OF MAKER TO COMPEL SURRENDER OR CANCELLATION OF OVERDUE PROMISSORY NOTE, and mortgage given to secure its payment, on the ground that the consideration for the note and mortgage was a promise of the payee to forbear to prosecute for an embezzlement. The law leaves the parties to an illegal contract exactly where it finds them.

Two bills in equity to compel the surrender or cancellation of two partly overdue promissory notes, and two mortgages on real estate, containing the usual power of sale clauses, given to secure the payment of such notes. The ground upon which the bills were sought to be maintained was, that the considerations of such obligations was a promise of defendants to forbear to prosecute one Joseph Atwood for the crime of embezzlement; that therefore the instruments were void, but were a cloud on plaintiffs' title, and might be used to their injury at some future time, when the evidence of such illegal consideration might be lost. The answer denied the bill, and alleged lawful considerations.

G. D. Noyes and J. C. Crowley, for the plaintiffs.

P. W. Chandler and J. B. Thayer, for the defendants.

By Court, AMES, J. A note given in consideration of a composition of felony, or of a promise not to prosecute for a crime of a lower degree than a felony, is illegal, and cannot be enforced by the promisee against the promisor. And it makes no difference that, of various elements making up the entire consideration, a part, and even the larger part, was legal and valid. If part of the consideration was illegal, the effect upon the note would be the same as if the whole were illegal. The plaintiffs insist that the notes referred to in their bills of complaint fall within this rule of law.

But it has also long been settled that the law will not aid either party to an illegal contract to enforce it against the

other; neither will it relieve a party to such a contract who has actually fulfilled it, and who seeks to reclaim his money, or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *In pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts. In the somewhat quaint language of Lord Chief Justice Wilmut, in *Collins v. Blantern*, 2 Wils. 350: "All writers upon our law agree in this: no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, o procul este, profani!*" In this respect, the rule in equity is the same as at law. Equity follows the rule of the law, and will not interfere for the benefit of one such party against a *particeps criminis*. The suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other. And so the modern doctrine is established, that relief is not granted where both parties are truly *in pari delicto*: 1 Story's Eq. Jur., sec. 298; *Claridge v. Hoare*, 14 Ves. 59.

There is no reason why equity should be able to grant relief upon principles different from those recognized in courts of law. If the plaintiffs were occupying the position of defendants, and if the cases before us were actions brought to recover the amount of the notes in question, they could avail themselves of the maxim above referred to by way of defense. But they do not stand in that position. They are themselves invoking the aid of the court in its equity jurisdiction to relieve them from a contract which they allege to be illegal. They are actors, or plaintiffs, and apparently are in a position in which the maxim in question can be invoked and relied upon on the other side. If the notes were founded on an illegal consideration, why should the court lend its process to aid one party to the illegality rather than the other? What superior equities, in that view of the case, have these plaintiffs over the defendants? We see no such inequality in position, or

abuse of advantages, as to entitle them to the aid of the court on the ground of public policy. If there has been a composition of a felony, or a suppression of a criminal prosecution, the plaintiffs were parties to it as well as the defendants, and it may perhaps be argued that the plaintiffs have had the benefit of the alleged corrupt agreement, and are merely seeking to be relieved from its inconveniences. They are seeking, not to get back money paid under an illegal contract, but to recall notes and securities which they have given under such a contract,—a distinction which is too slight to make much difference in the substantial equities of the case: *Worcester v. Eaton*, 11 Mass. 375.

We see no occasion for the interference of the court, as prayed for, upon any view of the case. If the book-keeper embezzled the funds of his employers, he not only committed a crime, but he also incurred a debt. This debt he was legally and morally bound to pay, and the defendants had a right to make use of all lawful and proper means to enforce its payment, or to obtain security. The rule of the common law, that all civil remedies in favor of a party injured by a felony are either merged in the higher offense against public justice, or suspended until after the termination of a criminal prosecution against the offender, is no part of the law of Massachusetts: *Boston etc. R. R. Co. v. Dana*, 1 Gray, 83. The fact that the debt grew out of a breach of trust, and had its origin in fraud and criminality, is not a reason, as a matter of law, for bestowing upon the debtor any peculiar privileges or exemptions. If the suppression of a criminal prosecution was one of the considerations for the contracts made and securities given by the plaintiffs, they can avail themselves of that fact as a defense in any suit at law against them upon such contracts. They are in no danger of losing the benefit of that defense, in consequence of any transfer of the notes to a third person. Some of the installments were overdue and unpaid, and for that reason no indorsee could so hold them as to deprive the plaintiffs of their defense. As to the exercise by the mortgagees of the power of sale given by the terms of the mortgages, it cannot be difficult for the plaintiffs to see that any purchaser at such sale should be fully notified (if notice should be thought necessary) of all grounds of objection to the notes and mortgages, and of their intention to contest any title which such purchaser shall venture to buy at the sale. It is well settled that all defenses (except the statute of limita-

tions) that can be made against the notes can also be made against the mortgages: *Vinton v. King*, 4 Allen, 562.

Whether the evidence reported can be said to prove the alleged illegality in the contract is a question which we have not found it necessary to decide, or even to consider. In any view that can be taken of that question, the plaintiffs are not in a position to claim the equitable relief prayed for; and therefore, in each case, the bill is dismissed, with costs for the defendants.

THE PRINCIPAL CASE WAS CITED IN *Faxon v. Folvey*, 110 Mass. 396, to the point that where A conveyed land to B, with an oral agreement that B should hold it in trust for A, and B afterwards signed a declaration of trust to that effect, the fact that the deed of the land was executed and delivered on Sunday would not entitle B to hold the land discharged of the trust; and in *Snyder v. Willey*, 33 Mich. 495, to the point that the promisee in a written contract, based upon an illegal consideration in part, cannot enforce the writing, where he was a party to such illegality. A multitude of other cases were there cited to the same point.

HENNESSEY v. OLD COLONY AND NEWPORT R. R. Co.

[101 MASSACHUSETTS, 540.]

ONE WHO GRANTS LAND AS BOUNDING ON STREET, AND OWNS STRIP OF LAND SO DESCRIBED AS STREET, cannot be compelled in equity, at the suit of the grantee, to open and maintain the strip as a street fit for travel.

BOUNDARY UPON STREET DOES NOT IMPLY COVENANT THAT IT HAS BEEN, or will be, maintained so as to be fit for travel.

BILL in equity to compel the opening of a street and its maintenance fit for travel. The facts are sufficiently stated in the opinion.

J. C. Park, for the plaintiff.

C. F. Choate, for the defendants.

By Court, AMES, J. The deed under which the plaintiff claims describes the lots of land conveyed by it as bounded, on one side, on a private way or street, twenty-five feet wide. It also refers to a plan which shows the general course and limits of the street. The defendants, who were his grantors, owned the adjacent land described in the deed as the way or street.

It was held in *Parker v. Smith*, 17 Mass. 413 [9 Am. Dec. 157], and also in several more recent cases, that such a form

of expression in a deed is "not merely a description, but an implied covenant that there is such a street." It has also been decided that the descriptive words as to the street, particularly if the deed refers to an accompanying plan of lots and streets, are not to be understood merely as signifying that the street in question is co-extensive with the lot conveyed, but that its extent, direction, and termini are to be such as are delineated on the plan, or otherwise indicated by the deed: *Thomas v. Poole*, 7 Gray, 83. But even under the rule adopted in *Parker v. Smith*, *supra*, the description of a street as a boundary was not understood to be an assurance or implied covenant that it had been constructed and put into a condition for present use as a passage-way: *Loring v. Otis*, 7 Gray, 563. Still less would it impose upon the grantor any obligation to proceed to grade and construct it at his own expense. The most that could be said would be, that it amounted to an appropriation, or setting apart, of a portion of the adjacent land to that use.

But in the recent case of *Howe v. Alger*, 4 Allen, 206, the subject has been carefully and ably re-examined by Mr. Justice Dewey, and on a review of the decisions it is now established that "the whole extent of the doctrine is, that a grantor of land, describing the same by a boundary on a street or way, if he be the owner of such adjacent land, is estopped from setting up any claim, or doing any acts, inconsistent with the grantee's use of the street or way." Under this rule it is difficult to find in the plaintiff's deed anything, in relation to the street, that can be said to be in the nature of an executor's contract, which could be the proper subject for a decree for specific performance. In one sense the deed operates as a conveyance of a right of way over the street; that is to say, the grantors and all claiming under them are estopped to deny the existence of the street, or do any act inconsistent with the plaintiff's use of it as such. But the plaintiff's right is in the nature of an executed grant. He holds under a conveyance which has taken full effect, and which contains no stipulation or assurance that the grantors are to do anything, at any time after the date of the deed, to add to what has been actually conveyed, or to render it more effective.

It will be found, on examination of the cases, that the question as to the rights of the grantee in a street named in a deed as a boundary, is usually raised in an action of tort, brought by one of the parties against the other, for erecting or removing a fence or other obstruction in the way. No case has been

pointed out to us in which an action has been maintained against the grantor on the ground that such a deed is substantially a covenant or promise to open and maintain a street. The plaintiff's rights can be vindicated in some form of action, but he is not entitled to the remedy which he seeks by this bill.

Bill dismissed.

GRANT OF LAND BOUNDED BY STREET, EFFECT OF GENERALLY: See note to *Warren v. Blake*, 89 Am. Dec. 759.

PRINCE v. BOSTON AND LOWELL RAILROAD CORPORATION.

[101 MASSACHUSETTS, 542.]

DELIVERY OF GOODS TO CARRIER BY CONSIGNOR FOR TRANSPORTATION TO CONSIGNEE IS SUFFICIENT DELIVERY, and the lien of the latter for advances made upon the goods in anticipation of shipment will attach as soon as the goods are so delivered.

POSSESSION OF BILL OF LADING SIGNED BY AUTHORITY, AND INDORSED, IS EVIDENCE OF TITLE. Even if the bill was not authorized, yet if the goods were actually sent to the consignee, his lien for advances will attach.

REPLEVIN for oats. Plaintiffs were commission merchants. They were notified by letter that the oats would be sent to them. Subsequently they received the bill of lading, stating that the goods were sent by one Larocque, consigned to the plaintiffs. Plaintiffs, about the time of the arrival of the bill, accepted and paid, as advances on the oats, a draft drawn by Larocque, accompanying the bill of lading, and arranged with him by letter that they should remain for a time aboard the vessel. The oats were afterwards sent without plaintiffs' knowledge to Boston over the railroad of the defendants, who refused to deliver them to plaintiffs. Plaintiffs' testimony tended to show that Larocque employed Joseph Bissonette, as his agent, to purchase the oats for him and load them on the barge, which was done. Defendants contended and introduced evidence tending to show that Bissonette was the true owner of the oats; that he bought them on his own account, shipped them on board the barge, and received a bill of lading to his own order, signed by Xavier Savageau; and that Xavier, and not Joseph, Savageau, was the master of the barge. The bill of lading put in by the plaintiffs was not signed by Joseph

Savageau with his own hand. There was evidence, however, that he authorized its signature; but this was denied by the defendants. Plaintiffs requested the following instructions, which were refused, viz.: that commission merchants have a lien on goods consigned to them for sale for advances made thereon, specifically or on general account, as soon as the goods are delivered to them; that a delivery to the carrier for transportation is a sufficient delivery to the consignee; that advances may be made before the goods are shipped in anticipation thereof; that a consignment may be made upon a bill of lading; that the possession of a bill of lading, signed by authority and indorsed, is evidence to be considered; and that if the bill was not authorized, yet if the goods were actually sent to plaintiffs, their lien for advances would attach. Verdict for the defendants, and the plaintiff alleged exceptions.

A. A. Ranney, for the plaintiffs.

W. Gaston and B. E. Perry, for the defendants.

By Court, COLT, J. The principal contest before the jury, and most of the instructions and rulings of the court, grew out of the respective claims of Larocque and Bissonette to the original ownership of the oats, the present title to which was in controversy.

The plaintiffs claim title under Larocque, by virtue of a consignment to them to cover advances, and a delivery to a common carrier for them. It was conceded that, if Bissonette was the original owner, and shipped the property on his own account, then the title of the plaintiffs must fail.

The jury were unable to agree upon the separate question submitted to them, whether the oats, at the time of shipment, were the property of Larocque or Bissonette. This disagreement renders it unnecessary to discuss many questions, raised at the trial, relating to this part of the case, and which are not now, and may never become, material.

Under the instructions given upon the other branch of the case, — namely, upon the question whether Larocque passed his title to the plaintiffs, — a general verdict was found for the defendants. The jury were told, in substance, that the burden was on the plaintiffs to satisfy them, so as not to leave them in doubt that the bill of lading

signed by Joseph Savageau was valid and binding; that a bill signed by one who was not master would have no operation to pass title; that if signed by one who was master, or by his request or authority, it would be valid; and that the jury need go no further, if they found that Joseph was not, and Xavier Savageau was, master, and signed the defendants' bill of lading.

These instructions proceed apparently upon the ground that the only mode in which title could be passed from Larocque to the plaintiffs was by transfer of a regular and valid bill of lading to them. And those of the jury, therefore, who found that Larocque was the original owner of the property must have been brought to the other conclusion, — namely, that there had been no transfer of title from him to the plaintiffs, under the instructions given, — by reason of the failure to produce a valid and binding bill of lading. We must therefore assume, in disposing of these exceptions, that the plaintiffs' claim of the original ownership of Larocque, which has not as yet been negatived by the jury, is well founded, and that he was, at the time of the shipment, the true owner.

It is to be noted that the question here presented does not arise between two persons claiming title to the same property as holders of two separate bills of lading, one of which is genuine, and the other not, and both transferred by the former owner. To such a state of facts, the rulings given would be more appropriate. The case at bar is narrowed to a controversy between the plaintiffs, claiming to have acquired title from the true owner, and the defendants who, in disposing of this question, must be regarded as having no title or rights of possession derived from him. And in the opinion of the court, the instructions given, as applied to this state of the case, were erroneous.

It is too well settled to need a citation of cases that delivery to a carrier, with intent, on the part of the vendor or consignor, to pass the property, either absolutely or specially, to the purchaser or consignee, who has made advances, is effectual as a delivery to that end. The carrier is, in such cases, in contemplation of law, the bailee of the person to whom, and not by whom, the property is sent. And a delivery to him, with no *jus disponendi* reserved to the shipper, is as effectual as if to the consignee himself. It is always a question of the intention with which the act is done. And all acts, declara-

tions, and circumstances accompanying it, and which indicate its purpose, are admissible in evidence.

Taking a bill of lading or shipping receipt in the name of the consignee, or, when taken in the name of the consignor, a transfer to him, is, it is true, the most usual and satisfactory mode of indicating the intention. It is not, however, the exclusive mode. In *Bryant v. Nix*, 4 Mees. & W. 775, 791, Baron Parke, speaking of certain receipts given by the master of a canal-boat for oats consigned to a factor who had made advances, says that, "as evidence of such a transaction, it is immaterial whether the instruments are bills of lading or not; and it might equally be proved through the medium of carriers' or wharfingers' receipts, or any other description of document, or by correspondence alone." So where the bill of lading has not been transmitted to, or reached, the consignee, or when none has been given, the invoice, or any other instrument which specifies or enumerates the property sold, may be substituted for it: *Haille v. Smith*, 1 Bos. & P. 563; *Anderson v. Clark*, 2 Bing. 20; *Gardner v. Howland*, 2 Pick. 599; *Gibson v. Stevens*, 8 How. 384.

In the case at bar there was evidence of such delivery, proper to submit to the jury, although the bill of lading was signed by a party who was not authorized. The indorsement by Larocque and delivery of the instrument itself, his letter of November 19th to the plaintiffs, the policy of insurance made payable to them, the testimony of Larocque, with other circumstances connected with the transaction, were admissible to show an actual delivery to a carrier for the plaintiffs. The several instructions asked for by the plaintiffs upon this part of the case should have been given. Under such instructions, the jury might not have found for the defendants: 1 *Smith's Lead. Cases*, 6th Am. ed., 891; *Benjamin on Sales*, 130, 282, 514.

It is unnecessary to pass upon those exceptions which relate to the rejection and admission of evidence, because on the new trial, which must be had, the questions will necessarily be presented to the court in a different aspect.

Exceptions sustained.

THE PRINCIPAL CASE WAS CITED IN *Merchants' National Bank v. Bangs*, 102 Mass. 297, to the point that a bill of lading sent unindorsed in a letter, and containing no words of transfer, does not give the party receiving it a claim to the property.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

CAMPBELL v. GODFREY.

[18 MICHIGAN, 27.]

TENANT IN COMMON OF SINGLE TRACT OF LAND CANNOT, IT SEEMS, AS AGAINST HIS CO-TENANTS, hold or sell part of the tract by metes and bounds, or convey an undivided interest in a specific part only, nor can such part or interest be sold on execution against him; but whether the rule applies where there are several other tracts, held by the same tenancy, in which no interest is sold, is doubtful.

GRANTEES OF INTEREST OF TENANT IN COMMON IN PART OF SEVERAL TRACTS OF LAND HELD IN COMMON cannot maintain a bill to set aside a previous execution sale of the tenant's interest in such part, on the ground that the sale of such an interest is invalid; because, if the execution sale is void, the conveyance, for the same reason, is also void; and if the conveyance is valid, the execution sale must also be valid.

ONE WHO COMPLAINS OF EXCESSIVE LEVY UPON HIS LANDS SHOULD MOVE FOR RELIEF in the court from which the execution issued, instead of proceeding by bill in equity.

EXECUTION SALE OF LANDS WILL NOT BE SET ASIDE FOR INADEQUACY OF PRICE ALONE, especially when it is subject to a year's redemption, of which the execution debtor does not avail himself.

ONE WHO FAILS TO REDEEM LANDS SOLD ON EXECUTION WITHIN TIME LIMITED BY STATUTE, through culpable negligence or ignorance of the law, has no claim to relief in equity.

BILL in chancery. The facts are stated in the opinion.

Walker and Kent, and T. Romeyn, for the complainants.

John J. Speed and D. C. Holbrook, for the defendants.

By Court, **CHRISTIANCY, J.** The bill in this case was filed to remove a cloud from the complainant's title to an undivided ninth of lots 93 and 94, in section 1, and lot 67, in section 2,

of governor and judges' plat of the city of Detroit. Complainant claims title to this one ninth as the grantee of his brother, Theodore J. Campau, one of the heirs of Joseph Campau, deceased, — complainant owning another ninth as such heir.

Joseph Campau, the ancestor, died intestate, July 23, 1863, seised of this and a large amount of other real estate, situate mostly in Wayne County, but a large amount of it in many other counties in this state, — the whole amounting in value to some two millions of dollars.

After the levy and sale presently to be noticed, but before the time of redemption had expired, all the heirs of Joseph Campau, except the children of James J. Campau, deceased (one of the heirs of Joseph), owning the one ninth, joined in the attempt to make an amicable partition among themselves of all the real estate of their ancestor, Joseph Campau, wholly ignoring the children of said James J., and their interest; and, for the purpose of effecting this partition, mutually executed and delivered deeds purporting to release and convey to each other, in fee and in severalty, entire parcels of said estate, and specific blocks and lots by number and description, thus purporting to divide up the whole estate in the same manner as if they had owned the whole, instead of the eighth ninths only.

The lots here in question were thus released and purported to be conveyed, in fee and in severalty, to the complainant by the other heirs (including said Theodore), who owned the seven ninths, — the heirs of James J., owning the one ninth, not joining or being recognized in any way.

Under this conveyance, complainant claims to have acquired from said Theodore the one undivided ninth of these lots, which is all that is in controversy in this case.

Such is the title of complainant.

Defendants Driggs and Butler claim title under levy and sale upon an execution against said Theodore, made to Godfrey, Dean, and Brow, some time prior to the partition deeds already mentioned, but the time of redemption upon which had not expired when such partition deeds were executed, though the sheriff's certificate of sale was on file in the office of the register of deeds. The sale on the execution was of the interest of said Theodore in the lots here in question, and in two other lots subsequently conveyed by the partition deeds to other heirs. The interest of Theodore in each of these lots was sold separately for \$37.50, making in all \$187.50.

After the expiration of the year allowed to the defendant in execution to redeem, Godfrey, Dean, and Brow sold their interest in the purchase, and assigned the certificate of sale to John J. Speed, who subsequently sold and assigned the certificate to defendants Driggs and Butler, to whom the sheriff (after the fifteen months allowed to creditors to redeem) executed a sheriff's deed in due form.

Complainant claims that this sale on the execution constitutes a cloud upon his title, and that it is void upon two grounds. But the main ground upon which he relies is, that the execution sale was of the interest of Theodore in only a part of the real estate owned at the time in common by him and the other heirs,—there being a large amount of other real estate thus held in common by the same parties, Theodore's interest in which was not levied upon or sold;—and that the only way in which any interest of Theodore's could be sold on execution, or in which Theodore himself could have sold, was to sell an undivided interest in all the real estate thus held by the same tenancy, or, at least, in all lying in the same county.

In support of this proposition, complainant relies upon a considerable number of American authorities, no English decisions furnishing any direct support for the rule upon which the objection is based, and the little which is found in the English books tending, in some degree, to an opposite result, though the rule is supposed to result from common-law reasons springing from the ownership of joint estates.

So far as the rule relied upon has been recognized, it is purely American, having originated in Massachusetts, in *Bartlet v. Harlow*, 12 Mass. 347 [7 Am. Dec. 76], and *Varnum v. Abbot*, 12 Id. 474 [7 Am. Dec. 87], which have been followed, to a greater or less extent, in several of the states; some having extended, and others narrowed, its application, and there being little uniformity in this respect.

In the great majority of the estates, the question does not seem to have been decided, the cases being silent on the point; while Ohio seems to have expressly repudiated the whole doctrine in all its forms: See *White v. Sayre*, 2 Ohio, 110; *Pren-tiss's Case*, 7 Id. 470 [or part 2, p. 129]; *Treon v. Emerick*, 6 Id. 391.

The question sought to be raised by this objection has never been decided in this court. And as it is one of the first importance, the decision of which may seriously affect many

titles, we propose to consider the general nature of the objection, with the reasons upon which it is based, as recognized by the authorities, without, in the first instance, expressing any decided opinion of our own until we see whether the question is properly involved in the case.

When the question arises with reference only to a single tract or parcel owned jointly or in common, the authorities are numerous and uniform that one tenant cannot, without the assent of his co-tenants, select a part of the tract by metes and bounds, and hold or sell it as his share in the tract, thus making a partition by his own act which shall bind his co-tenants: See for examples, *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 22]; *Holcomb v. Coryell*, 11 N. J. Eq. 548; *Staniford v. Fullerton*, 18 Me. 229.

The reasons for this are so obvious that they would probably be universally admitted. And for a similar reason, it seems to have been held by the courts of most of the states in which the question has arisen, that it is equally incompetent for such tenant, as against his co-tenants, to convey an undivided interest in a specific portion only, by metes and bounds, of a tract so held jointly or in common; and that, so far as the rights of the other co-tenants would, upon partition, be injured by giving effect to such deed, and compelling them to take their shares in several small portions, such deed would be treated as voidable, at the option of such co-tenants.

The rule for which complainant contends seems to have originated in this class of cases, when but a single parcel was in question. And such, with two exceptions, are all the cases upon which he relies. And in some of the states (Connecticut and Maryland at least) the rule has been expressly held not to extend beyond a single parcel: *Starr v. Leavitt*, 2 Conn. 243 [7 Am. Dec. 268]; *Reinicker v. Smith*, 2 Har. & J. 421. But the reasons upon which the rule was first applied to the case of a single parcel were afterward in two cases only, so far as I have been able to discover (*Peabody v. Minot*, 24 Pick. 329, *Thompson v. Barber*, 12 N. H. 563), held to extend still further, and to apply as well to a sale of the tenant's undivided interest in one of several entire tracts when there were other tracts held by the same tenancy, in which no interest was conveyed. And it is not to be denied that there may be cases of this kind to which the reason applicable in the case of a single tract would apply with some, though generally a less, degree of force. Thus, there may be cases in which, if effect were

given to the conveyance as against the other tenants, each of the latter might be compelled, on partition, to take his share in such minute portions of several different parcels as greatly to reduce the value of his share, instead of receiving, as he otherwise might, larger portions together, or certain whole tracts or lots. On the other hand, the lands held by the same tenancy may be so situated, or the amount of them so great, that in many cases the interest of the co-tenants would not be prejudiced, on partition, by giving full effect to such conveyance. And this might sometimes happen in the case of a single tract only, especially of a large one, or so situated as to admit of a perfectly fair partition into such parts as might be required to give effect to the deed. And whenever, upon a fair partition, that part of the property in which an interest had been conveyed should be set off to the party selling, or to his grantee, the other co-tenants receiving their full share in as advantageous a form as if the conveyance had not been made, the whole ground of objection to the conveyance would seem to fail: See *Varnum v. Abbot*, 12 Mass. 474 [7 Am. Dec. 87]; *McKee v. Barley*, 11 Gratt. 340; *Robinett v. Preston*, 2 Rob. (Va.) 273; *Johnson v. Stevens*, 7 Cush. 431; *Holcomb v. Coryell*, 11 N. J. Eq. 548.

The only ground upon which such a conveyance can be held inoperative is the injury it might do to the co-tenants in partition, in the manner already stated: See *Varnum v. Abbot*, *supra*.

It has been sometimes suggested, and was urged upon the argument, that, beyond the difficulties to be encountered in setting off the shares of the co-tenants so as to preserve their rights, there was a further objection to the validity of such deed, as it would create the necessity of several suits for partition, when one suit would otherwise have answered the purpose. It is possible (though I express no opinion upon the point) that the purchaser, under such deed, might not be allowed to sustain a bill for partition against the co-tenant. But if any of the co-tenants bring the bill, it may at least be doubted whether there is any difficulty in making the purchaser a defendant: *Whitton v. Whitton*, 38 N. H. 127 [75 Am. Dec. 163]; Story's Eq. Jur., sec. 656 a, 656 b, 656 c, and cases cited; or whether the necessity of so doing (if it be necessary) can be recognized as a sufficient ground for holding the deed void, before it is in fact ascertained that a fair partition could not be made giving effect to the deed. And if the co-tenants, in bringing a bill

for partition, may ignore such conveyance, and make only the original tenant, who has thus sold, a party, still, if the share of the tenant selling should happen to be so set off as to include that in which an interest had been sold, such partition would, according to most of the authorities in which the point has been discussed, inure to the benefit of his vendee by estoppel; since the deed would be good as to him and all claiming under him, if not as to all parties other than the co-tenants who might be injured by it. And a sale on execution is held to stand on the same ground as a deed from the defendant in execution: *Bartlet v. Harlow*, 12 Mass. 348 [7 Am. Dec. 76]; *Varnum v. Abbot*, 12 Id. 474 [7 Am. Dec. 87]; *Porter v. Hill*, 9 Id. 34 [6 Am. Dec. 22]; *Baldwin v. Whiting*, 13 Id. 57; *Cutting v. Rockwood*, 2 Pick. 443; *Nichols v. Smith*, 22 Id. 316; *Cogswell v. Reed*, 12 Me. 198; *Cox v. McMullan*, 14 Gratt. 82; *McKee v. Barley*, 11 Id. 340; *Holcomb v. Coryell*, 11 N. J. Eq. 548; *Great Falls Co. v. Worster*, 15 N. H. 449; *Whitton v. Whitton*, 38 Id. 127 [75 Am. Dec. 163]; *Smith v. Benson*, 9 Vt. 138 [31 Am. Dec. 614]; *Johnson v. Stevens*, 7 Cush. 431; *Challefoux v. Ducharme*, 4 Wis. 554.

But the necessity of making the purchaser a party, or even of having two suits or two partitions in the same suit, instead of one, if the shares can still be fairly set off to the co-tenants, might seem to be a consideration going only to the costs of the proceeding, rather than an objection upon which alone the deed could be held void. The only ground upon which courts would seem to be justified in treating the deed as void, as against the co-tenants, is the impracticability of setting off their shares in as advantageous a form as if the deed had not been made; and this, as already suggested, would seem to depend upon the amount and condition of the property, and the special circumstances of each particular case.

In a direct proceeding for partition, the condition and amount of the property, and all the circumstances bearing upon the practicability of making a fair partition, can be (and are by the usual practice) inquired into and ascertained, so that the court can in such cases see and determine whether effect can be given to the deed, and a fair partition still be made. And though, in such partition, the purchaser of an interest in a part were not a party, yet, by the ordinary and correct practice of the court, there would be a reference to ascertain and report the state of the title; and the interest of such purchaser ought, therefore, to appear. And whenever this does appear,

unless something should appear to show that the conveyance was not fair, or for a valuable consideration, it is not, perhaps, easy to see why the court, upon principles of equity, should not seek to protect the interest of such purchaser, so far as this could be done without injury to the co-tenants; and if the share of a purchaser could not be set off to him, that it should at least be set off to the original co-tenant who made the conveyance, as a part of his share, if found practicable without injury to the others, so as to give the purchaser an opportunity to enforce his rights, as against his vendor, by a partition of that portion of the property: See authorities above cited, especially *Robinett v. Preston*, 2 Rob. (Va.) 273; *McKee v. Barley*, 11 Gratt. 340; *Holcomb v. Coryell*, 11 N. J. Eq. 548.

This duty might seem to result from the doctrine of most of the cases, that the deed is only to be treated as void so far as it injuriously affects the co-tenants, and that it is good against the grantor and those claiming under him. But see *McKey v. Welch*, 22 Tex. 390. When the question of the validity of the deed arises collaterally, as it does here, cases may certainly occur in which, owing to the peculiar circumstances and the nature and number of such conveyances, enough may appear to the court to enable them to see, beyond all question, that such conveyance, if held effectual, must necessarily prove injurious to the co-tenants. And whenever this does so appear, the reason for holding the conveyance void, to this extent, as against the co-tenants, is sufficiently intelligible.

But where the question arises collaterally, as in this case, and enough does not appear to enable the court to see that giving effect to the deed must necessarily prejudice the co-tenants in setting off their shares, the principle upon which courts can, *a priori*, and without ascertaining the condition of the whole property and all the material circumstances, hold such conveyance void, is certainly not very clear. And in view of the reason upon which alone the rule purports to rest, — the injury which may be done to the co-tenants, which they may waive, — the principle on which the conveyance can be held void, so as not to pass the title of the grantor, as to all except the co-tenant, would seem to be involved in some obscurity. In Virginia it has been expressly held that such conveyance by one tenant in common, of his interest in a part of an entire tract held in common, passes the title of the grantor in such part, not only as against himself and those

claiming under him, but as to all other persons except the co-tenants injured by it; and as to them also, except so far as they would be injured. And this is said to be the fair result of the Massachusetts doctrine, and that of other authorities, which hold the deed voidable on account of the injury to the co-tenants, and not absolutely void: *Robinett v. Preston*, 2 Rob. (Va.) 273; *McKee v. Barley*, 11 Gratt. 340; and see *Holcomb v. Coryell*, 11 N. J. Eq. 548.

No distinction seems to be made in the authorities between a sale by the tenant himself and a sale on execution against him. But where, as in some of the New England states, no sale is made upon the execution, but the land is set off and possession delivered to the creditor, it is possible that this necessity of delivering possession may furnish a better ground for holding the proceeding void, in such a case, than may be found to exist in the case of a sale. Again, the rule which is to render void the conveyance by one tenant in common of an undivided interest in the whole of one or several parcels, where there are other parcels held by all the same tenants in common, must, in its application, be limited somewhere; since, if applied to cases where large amounts of property are held in common even in the same county, to say nothing of different counties and different states, the remedy to be secured by holding the conveyance void might sometimes be worse than the evil to be remedied; as it might tend materially to check the power of sale, and drive the owners to the expense of a partition when, otherwise, it would be unnecessary.

It was suggested by complainant's counsel, that the rule would be restricted to cases where all the tenants held under the same title. But the reason of this rule in the case of a tenancy in common has no connection with the mode in which the title was acquired. It grows simply out of the common ownership, without reference to the mode of its acquisition. And all the property thus held in the same jurisdiction might be partitioned in the same suit, however numerous or diverse the titles by which it was acquired. No unity of title was ever necessary in the case of tenancy in common, and at common law seldom existed. Any limitation of the rule upon this basis, though it might sometimes be convenient, would be merely arbitrary. *Peabody v. Minot*, 24 Pick. 329, limits the application of the rule to all the common property in the same county; because the jurisdiction, upon partition, was co-exten-

sive with the county; while in *Thompson v. Barber*, 12 N. H. 563, it was held to extend to all within the state.

In view of all the difficulties in fixing, upon principle, any just and practicable limitation in the application of the rule, it may admit of some doubt whether the rule should be extended beyond a single parcel. Upon this point the authorities may be regarded as yet equally balanced,—Connecticut and Maryland being one way, and Massachusetts and New Hampshire the other.

But whatever may be the force of the rule or the extent of its application, if it applies to the execution sale, and defeats the title of Driggs and Butler, it must apply with at least equal force and much more clearly to defeat the title of the complainant.

The deed from Theodore J. Campau to the complainant conveyed, not one ninth of all the property held in common by the same tenancy, nor even of the whole so held in the county of Wayne, but one ninth of these lots and the other lands attempted to be conveyed to him in severalty as his share. And such was the case of every conveyance executed by each of the heirs who executed deeds to each of the others. Complainant's counsel insist that the objection to such conveyance by one tenant in common only applies when made to a stranger, and where, for instance, there are but two tenants in common, one of whom conveys to the other, this is doubtless true, as the other tenant, by taking the conveyance, waives the objection. But when there are several other tenants in common (of the same and other lands) besides the grantor and the grantee, the injury to them would be precisely the same as if the conveyance had been made to a stranger, and the same difficulties would be encountered in setting off their shares upon partition.

It is true that if all the heirs or tenants in common, including the children of James J., had joined in making such partition and conveyances, as each would have received his share, there being none of the co-tenants who could thereby be injured, the deeds must have been effectual as to all, so far as this point is concerned.

But these conveyances of all the other heirs except the children of James J., dividing up the whole estate among themselves, entirely ignoring the interest or share of these children, are far more objectionable than the conveyance by a single tenant in common of an interest in any number of par-

cels less than the whole, held by the same tenancy. These conveyances must, as to the heirs of James J., be held void to the extent of one ninth, or they could receive nothing, either in common or in severalty. And to give any effect to all these conveyances, the heirs of James J., in obtaining partition, must, even if they took their shares collectively, take a portion equal to one ninth by metes and bounds in every separate tract, lot, or parcel of the entire estate of Joseph Campau, unless, owing to the great amount of the lands of the estate, it should be found practicable to take in a satisfactory form in larger parcels an equal amount in value from each of the heirs conveying. And in that event the deeds of the heirs to each other must be treated as void to that extent.

This result, the court cannot fail to see without any inquiry into facts beyond those appearing in the records, must be much more likely to prove injurious to them than the execution sale to any of the parties, and more likely to diminish the value of their shares.

And in making a partition, to which the heirs of James J. are entitled, some of these deeds must be held invalid to some extent, and this would naturally lead to the necessity of treating them all as void, even as between themselves, unless the obstacle should be capable of being removed by the great extent of the estate, as above suggested.

Upon such partition, there can be no certainty that the particular lots now claimed by the complainant would fall to his share.

In fact, if a suit for partition should be had in which the purchaser under the execution sale should be ignored, these lots, for aught we can discover, would be as likely to be set off to Theodore as to the complainant, and he might then be estopped, as to the purchasers under the execution, in a partition sought by them, according to the principle of some of the authorities above cited.

But we need not determine whether these deeds were void, nor whether complainant, claiming under Theodore, is estopped to deny the validity of the execution sale, since, if the sale on the execution was void, because confined to Theodore's interest in separate parcels (less than the whole number) of the property held by him and the other heirs in common, as contended by complainant's counsel, for the same reason and under the same rule, the conveyance by Theodore to the com-

plainant was also void, and the complainant has failed to show title.

If the conveyance of Theodore to complainant was not void for this reason, then the sale on the execution was valid, so far as this objection is concerned, and the defendants Driggs and Butler have shown title, and the complainant must fail on this ground, unless the execution sale is void on some other ground, or the complainant shows some other ground for relief.

The only other ground upon which the sale on execution is claimed to be void is, that the levy was excessive. The fair value of the interest sold in the five lots (of which complainant claims three), had the estate of Joseph Campau been settled, and the title perfect, would have been from eight thousand to ten thousand dollars.

But to three of the most valuable lots the deceased appeared to have no record title, having held them by possession only; and the estate was unsettled at the time, and involved in a great amount of litigation between the different heirs, and between them and the administrators, with no reasonable prospect of an early settlement of the estate; so that it would have been difficult to fix any definite value upon the interest so sold.

The sale being at public auction, open and fair, and no fraud being shown or pretended, we do not think it can be set aside or treated as invalid in this proceeding, on the ground of an excessive levy, or because it sold for much less than its value, especially as the sale was subject to a year's redemption.

As an excessive levy merely, it is clear the remedy would have been by motion to the court from which the execution issued, and before sale, to set it aside. Every court controls its own process. No such motion having been made, and the whole year's redemption having expired, and the deed been given before any relief is sought, the objection is one purely of inadequacy of price for which the sale was made. The remedy for this also, if any, was by motion: See *Cavanaugh v. Jakeway*, Walk. Ch. 344; which should have been promptly made: See *Noyes v. True*, 33 Ill. 503, which was a bill to set aside a sale for inadequacy, and it was held that, having neglected for the whole year (given for redemption) to make a motion on this ground in the court issuing the execution, and no excuse being shown for the delay, there being no fraud shown, complainant was not entitled to relief in equity.

In *Reed v. Brooks*, 3 Litt. 127, mere inadequacy of price, however great, was held not sufficient for setting aside a judi-

cial sale on motion. And no case has been cited, nor are we aware of any, in which an execution sale of real estate has been set aside, on motion or otherwise, for inadequacy of price alone, especially when, as in this case, it was subject to a year's redemption. The statute giving a year's redemption seems to rest mainly upon the idea that real estate may be sold for less than its value, and to give the time of redemption mainly on this ground. This is an adequate remedy, and if the debtor will not avail himself of it he cannot complain of it. Public policy requires that judicial sales which have been open and fair, and nothing done to prevent a sale at a higher price, should not be disturbed on the ground of inadequacy, since the effect of an opposite course would be to deter bidders, and render the prices on such sales still less. And any rule which might be laid down as to the degree of inadequacy would be wholly arbitrary: *Hammond v. Scott*, 12 Mo. 11; *Meirs v. Zell*, 7 Id. 331.

But that such sales cannot be set aside on this ground alone, at least in a collateral proceeding, see *Hart v. Bleight*, 3 T. B. Mon. 273; *Bank of New Brunswick v. Hassert*, 1 N. J. Eq. 1; *Simmons v. Vandegrift*, 1 Id. 55; *Roe v. Ross*, 2 Ind. 99; *Benton v. Shreeve*, 4 Id. 66; *Newman v. Meek*, 1 Freem. Ch. 458; *Mercereau v. Prest*, 3 N. J. Eq. 460; *Outcalt v. Disborough*, 2 Id. 218; *Carson's Sale*, 6 Watts, 140; *Cooper v. Galbraith*, 3 Wash. C. C. 546.

But lastly, the complainant insists that, if the execution sale is valid, he ought still to be permitted to redeem. This claim is sought to be sustained on the ground of certain conversations or attempted negotiations between Theodore and Mr. Cheever, who had been the attorney of the execution creditors in obtaining the judgment and making the sale. But aside from the facts that the sale was made to Godfrey, Dean, and Brow, whose certificate was on file and notice to all parties, and that Cheever had no authority to make any arrangement which should affect the sale, we do not consider it as quite certain that any of the conversations in relation to the subject took place until after the year's redemption had expired. However this may be, the subject of those conversations seems to have been confined to an attempt on the part of Theodore to get a deduction from the amount of the judgment, without any reference to the question of extending the time of redemption; and even upon this point no agreement was ever arrived at.

It is clear from the evidence that all the most important of even these conversations (if any of them could be of any importance) were had after the year allowed to Theodore to redeem had expired, and just prior to the expiration of the fifteen months allowed to creditors for redemption, Theodore evidently supposing that he had fifteen months to redeem, instead of a year; and finding he could get no deduction, then undertook to redeem.

Complainant himself was aware of this sale before the time of redemption expired, and relied upon Theodore to redeem. He stands in no better position than Theodore himself. The claim to redeem, therefore, rests upon the culpable negligence of Theodore and the complainant, or their ignorance of the law, neither of which will authorize the court to grant the redemption without going far beyond the recognized grounds of equity jurisdiction.

The two points last considered present the only questions necessarily involved in this case; because, as already shown, if the sale under the execution was void, as confined to an interest in certain parcels less than the whole, then, upon the like ground, the conveyance from Theodore was invalid; and complainant has shown no title. If, on the other hand, the sale on the execution was not invalid on the ground supposed, the defendants Driggs and Butler have shown a good title; and in either event, the complainant has equally failed to sustain his bill.

The decree of the court below must therefore be reversed, and the bill dismissed; and defendants must recover their costs in both courts.

COOLEY, C. J., and GRAVES and CAMPBELL, JJ., concurred.

CONVEYANCE BY CO-TENANT OF PART OF LAND BY METES AND BOUNDS, VALIDITY OF: See *Whitton v. Whitton*, 75 Am. Dec. 163, and note; *Marshall v. Trumbull*, 73 Id. 667, and note; *Ballou v. Hale*, 93 Id. 438; and as to the effect of execution upon his interest in part of the lands, see *Whitton v. Whitton*, *supra*, and note collecting prior cases in this series. In *Butler v. Royce*, 25 Mich. 53, 55, it was held that a tenant in common of several tracts may convey his undivided interest in one or more of them, and it may be sold on execution against him, thus deciding the question left undecided by the principal case. In making partition, if a parcel sold and conveyed by one tenant in common by metes and bounds can be assigned to the purchaser as a part or the whole of the share of his grantor, without prejudice to the co-tenants, the court will so assign it, thereby making the purchaser's title perfect: *Bogges v. Meredith*, 16 W. Va. 29, citing the principal case.

EXCESSIVE LEVY, EFFECT OF: See *Glidden v. Chase*, 56 Am. Dec. 690, and note; *Avery v. Bowman*, 77 Id. 728; and see *Baker v. Clepper*, 84 Id. 591. Every court controls its own process, and will prevent an abuse of the same, if its attention is seasonably called thereto on motion: *Blair v. Compton*, 23 Mich. 422.

INADEQUACY OF PRICE IN EXECUTION SALES, EFFECT OF: See *Smith v. Randall*, 65 Am. Dec. 475, and note collecting cases; *Brittin v. Handy*, 73 Id. 497; *Swires v. Brotherline*, 80 Id. 601; *Sowles v. Harvey*, 83 Id. 315; *Baker v. Clepper*, 84 Id. 591; *Chambliss v. Tarbox*, 84 Id. 614.

MORTON v. PRESTON.

[18 MICHIGAN, 60.]

ADMINISTRATRIX MAY MAINTAIN TROVER FOR CONVERSION OF CERTIFICATE OF STOCK AGAINST ONE WHO RECEIVED IT FROM HEIR, AS SECURITY FOR A DEBT, WHERE, AFTER THE DEATH OF THE INTESTATE OWNING THE CERTIFICATE, AND BEFORE THE APPOINTMENT OF THE WIDOW AS ADMINISTRATRIX, THE WIDOW AND HEIRS INDORSED IT, AND CAUSED IT TO BE SENT BY ONE OF THE HEIRS TO A CERTAIN PERSON FOR SALE, AND SUBSEQUENTLY SUCH HEIR, WITHOUT THE ASSENT OF THE WIDOW AND THE OTHER HEIRS, MADE AN AGREEMENT TO PLEDGE IT AS SECURITY FOR A DEBT WHICH HE OWED, AND GAVE AN ORDER ON THE CUSTODIAN OF THE CERTIFICATE FOR ITS DELIVERY TO THE CREDITOR, WHO SUPPOSED THE HEIR OWNED IT, AND WHO OBTAINED IT AND SOLD IT.

ONE WHO CONVERTS CERTIFICATE OF STOCK MUST BE REGARDED AS HAVING CONVERTED SHARES WHICH THE CERTIFICATE REPRESENTS, SO THAT HE CANNOT CLAIM TO BE LIABLE ONLY FOR NOMINAL DAMAGES FOR SUCH CONVERSION.

TROVER to recover damages for the conversion of a certificate of stock. The opinion states the facts.

D. J. Davidson and A. Pond, for the plaintiff in error.

Walker and Kent, for the defendant in error.

By Court, GRAVES, J. The plaintiff in error brought trover in the court below against Preston, to recover damages for the alleged conversion by him of a certificate for fifty shares of stock of the Buffalo and Detroit Transportation Company, and which certificate, and the stock represented by it, Mrs. Morton claimed to have belonged to the estate of her late husband.

It appeared in evidence, on the trial, that Mr. Morton died intestate in this state, in February, 1865, leaving his widow, the plaintiff, and three children, namely, J. Sterling Morton, William D. Morton, and Emma Morton, all of full age, him surviving. It further appeared that, after the death of Mr. Morton, the certificate in question was found among his papers, and taken possession of by his family. The estate not appearing to be indebted, no step was taken to administer

upon it at the time, and the children mutually agreed that Mrs. Morton and her daughter, Emma, should occupy the homestead, and receive and use the income of the estate for their support, so far as necessary, and preserve the property; and that upon the death of Mrs. Morton the estate should be divided among the children. It having been subsequently thought advisable to convert the stock in question into money, in order to invest the proceeds in real estate security, the widow and children, to effectuate that object, in August or September, 1865, placed their names upon the certificate, and caused their indorsements to be attested by two witnesses. The certificate thus written upon was placed in the hands of William D. Morton, one of the children, with express instructions to send it to one Armstrong, at Buffalo, to be by him sold and converted into cash. Young Morton then transmitted the certificate to one Gridley, at Buffalo, to be by him handed over to Armstrong, if the latter could sell it, but it was not sold. About the 1st of November, 1865, the defendant, Preston, who was a banker at Detroit, held a note for four thousand two hundred dollars, made by one Wilkins, and indorsed for the accommodation of the latter by said William D. Morton, which had matured and was unpaid. Preston urged young Morton to pay the note, and threatened to institute legal proceedings against him if the matter was not satisfactorily arranged.

Morton was then expecting to be elected cashier of a new bank about to be organized in Detroit, and was apprehensive that a suit against him on the Wilkins note would impair, if not destroy, his chance for an election. He thereupon offered to take up the Wilkins note by substituting his own, but Preston declined to arrange the matter on that basis, unless Morton would give additional security. Morton then proposed to give the stock as security, but informed Preston that the certificate was issued to the father, Julius D.; that it had been indorsed by Mrs. Morton and the heirs, and was then in Buffalo to be sold. Preston acceded to this proposal, and young Morton thereupon gave his own note for the amount of the Wilkins note and an order on the custodian of the stock at Buffalo for the delivery of the certificate, and Preston surrendered the Wilkins note to Morton. In this negotiation between William D. Morton and Preston, the former talked about the stock as though it belonged to him, but the latter did not ask him whether he owned it or not.

At this time young Morton was cashier of the Farmers' and

Mechanics' Bank of Detroit, and the transaction referred to occurred at the office of Preston in the same city. After acquiring the order from Morton, Preston, by means of it, obtained possession of the certificate.

This disposition of the certificate by William D. Morton was wholly unauthorized by Mrs. Morton and the brother and sister of William, and was unknown to them until some time in the following spring, when Preston, on being applied to by one of the heirs, and before he had obtained actual possession on the order, refused to give up the stock. On the 29th of December, 1866, the stock was sold by Preston for \$4,750, and on the 12th of November, 1867, Mrs. Morton was appointed administratrix of the estate; and thereupon she caused a demand to be made upon Preston for the delivery of the certificate, and at the same time offered to return the Wilkins note.

The sum for which the stock was sold, together with the interest from the time of sale, amounted to \$5,217.18. The defendant, Preston, testified, among other things, that when he made the arrangement with young Morton he had no knowledge that the latter was not acting in good faith in making the transfer, and supposed that he was the owner of the stock. He further testified that it was customary for bankers to loan money on certificates for stock indorsed in blank; and that when he received the order for the stock from Morton, the latter stated that the stock was in Buffalo for sale, and that he could pay him, Preston, when the sale should be made.

He also testified that, on receiving the order, he sent to Buffalo, and had the stock held subject to his order.

It likewise appeared in evidence that the balance due from Preston, after deducting the amount of the notes of William D. Morton, had been tendered, and that it was agreed that such balance should not be considered in the case.

The errors assigned are quite numerous, but we think that some of them are not material to the decision of the case, and that the others do not require to be separately considered.

It may be doubted whether, upon the theory of the defense, the plaintiff's right to maintain the action could be resisted. The stock belonged to the estate, and no administrator had been appointed. The family wished to sell, but had no design to pledge the stock as security for the debt of any person. The certificate was placed in the hands of W. D. Morton for

the sole purpose of being sent to Armstrong, who was to sell it if he could, and who was alone confided in by the family to make the sale. It was not at the time of the arrangement with Preston in the hands of young Morton, but was in Buffalo, where it had been sent according to the design of the family. These facts were not disputed. If, as a matter of fact, Preston was led to believe, by or without any representation on the subject on the part of young Morton, that the latter was the owner, it is difficult to conceive how any such belief, under the actual circumstances, could avail him as a defense against the claim of the true owner.

It appears that, at the very time of the arrangement, Morton had not the evidence of ownership sometimes implied by possession; and it is manifest that the instrument was not so indorsed for the purpose of transfer as to answer the requirements of the law merchant regulating the mode of transfer of commercial paper. The certificate was issued to Julius D. Morton, but the indorsements consisted only of the names of his widow and children. If it be admitted, therefore, that the certificate had the same negotiable qualities which belong to commercial paper, and required no greater or other formalities to work a change of title, which is the utmost that has been claimed for it, it is evident, I think, that the indorsement in question was not such as thereupon to make the legal title pass by delivery.

The form and nature of the indorsement were apparently insufficient to work a technical transfer of the legal title, and to see this was, in legal contemplation, to know it.

It seems to me, therefore, that the circumstance that young Morton never in fact possessed any authority to sell or pledge the certificate, and neither had possession nor the right to it, and the additional circumstance that the indorsement, as it stood upon the paper, was *prima facie* insufficient to pass the legal title, completely answer the claim set up by the defense.

Whatever may be thought, however, of this view of the present case, the court are of opinion that the case of *Cullen v. O'Hara*, 4 Mich. 132, which was decided upon much consideration, and from which we see no reason to depart, is decisive of the most material questions presented by this record.

In that case, O'Hara, as administrator of Ann O'Brien, brought trover against Cullen to recover for the conversion of gold coin amounting to \$585.

The substantial facts were, that the plaintiff's intestate died in November, 1848, in possession of the coin, and without having made any will; that during her last sickness she stated to her attendant, one Catharine Vaughan, that the principal part of the property in her possession belonged to the estate of her brother, one James O'Brien, who had died intestate some time before in New York, leaving an infant child named Ann O'Brien, his next of kin and sole heir, for whom Cullen was guardian, and that upon the death of Ann O'Brien, the elder, her attendant, Catharine, delivered to Cullen this coin in question. It was also proved that, in September, 1849, when O'Hara and Cullen were aware of all the facts and of the claims of each, the former, in his individual capacity, borrowed of the latter two hundred dollars of the coin in dispute, and gave his bond and mortgage to secure its repayment, and that the mortgage had been foreclosed when the trover suit was tried. O'Hara, as administrator, demanded the coin of Cullen, who refused to deliver it. It did not appear that any administrator had been appointed on the estate of James O'Brien.

On the trial, Cullen requested the court to charge the jury that the plaintiff, by loaning the two hundred dollars from Cullen, and giving his bond and mortgage therefor, was estopped from maintaining the action; and that if the jury believed that any part of the money was in the plaintiff's possession at the commencement of the action, the plaintiff was not entitled in any event to their verdict for such portion.

The court refused to charge as requested, but stated to the jury, in substance, among other things, that if the money belonged to the estate of James O'Brien, and was taken possession of and held by Ann O'Brien, in opposition to the rights of the heir, her right to possession passed to the plaintiff as her administrator, and that the latter could be held accountable only to an administrator of James O'Brien, and not to his heir.

The case having been brought here, it was deliberately determined by this court that the loan of two hundred dollars of the money in controversy, having been made by O'Hara in his individual capacity, did not estop him from asserting his right to the money as administrator; that the possession of the two hundred dollars obtained by the loan in no manner impaired his right to maintain trover for it, in his representative character, against the defendant; and that the loan made itself was as much a conversion as if it had been to a third person.

It was likewise held that, under our law, when one dies intestate, the title to his personal property does not go to the next of kin, but remains in abeyance until administration granted, and then vests in the administrator, as of the time of the death of the intestate, and that the next of kin becomes entitled only after administration, and then simply to the surplus remaining after the debts of the intestate and expenses of administration are paid.

It was also decided that when, in consequence of the death of the owner, another is clothed with the possession of personal property and assumes control of it, such casual possessor becomes responsible for the property, and may maintain the ordinary legal remedies, trover included, to defend it, and for self-protection; and further, that the administrator of such possessor may sue in trover for a conversion done after the death of the latter and before the appointment of the former.

As we are satisfied that the principles thus asserted afford a perfect answer to the leading points presented by the defense, and accepted by the court below, we do not deem it necessary to quote the reasoning stated in the report. If, as decided in O'Hara's case, his intestate could have maintained trover on her possession, and he, as her administrator, was entitled to the same remedy for a conversion after her death and before his appointment, it must be admitted that the right of Mrs. Morton, as administratrix of the estate owning the certificate and stock, to maintain trover, cannot be doubted.

Upon the argument before us, the defendant submitted a point not yet noticed, but which we think may be disposed of in a few words. He maintained that if the transfer by young Morton to Preston was void, it followed that the certificate only, and not the stock represented by it, was converted, and that consequently the damages could only be nominal.

It is quite certain that both parties always before the trial, and thereat, and the court below in the charge, treated the certificate as a muniment of title possessing substantial value, and that the facts clearly show that, by means of it, the defendant in error realized in cash the full value of the stock; and we think it cannot be maintained that it had no other value than such as the paper gave it. It was legally the subject of the form of action adopted in this case, and a judgment against Preston for the conversion would have the effect to confirm the title obtained and passed by him to the stock.

The judgment of the court below is reversed, with costs, and a new trial ordered.

The other justices concurred.

EQUITIES AGAINST HEIR CANNOT PREJUDICE SUIT OF ADMINISTRATOR: *McKinney v. Miller*, 19 Mich. 153; nor can the doctrine of estoppel be applied as between the administrator and one whom, as an individual, the administrator may have improperly dealt with: *Gilkey v. Hamilton*, 22 Id. 287; and see *Howard v. Patrick*, 38 Id. 804; but see *Burrows v. Debo*, 47 Id. 244; all citing the principal case.

TROVER WILL LIE FOR CERTIFICATE OF STOCK, NOTE, ETC.: *Connor v. Hillier*, 73 Am. Dec. 105, and note; *Robbins v. Packard*, 76 Id. 134; *Davis v. Funk*, 80 Id. 519. The principal case is cited in *Daggett v. Davis*, 53 Mich. 36, 40, to the point that trover will lie for the conversion of a certificate of stock.

THE PRINCIPAL CASE IS ALSO CITED in *Damouth v. Klock*, 29 Mich. 295, to the point that title to personalty, as a general principle, cannot be derived except through an administration; in *Miller v. Clark*, 56 Id. 342, to the point that where one dies intestate, the title to his personal property remains in abeyance until administration is granted upon his estate, and then rests in the administrator as of the time of his death; but see the principal case distinguished on this question in *Howard v. Patrick*, 38 Id. 801; and in *Gibson v. Miller*, 29 Id. 358, it is cited to the point that one who accepts a promissory note indorsed by a third person, but without indorsement by the payee, is bound to know that it would be open to defenses which such indorser might set up as to the condition upon which the indorsement was procured.

MARSTON v. BRASHAW.

[18 MICHIGAN, 81.]

CERTIFICATE OF ACKNOWLEDGMENT OF DEED IS NOT VALID UNLESS SUBSCRIBED by the acknowledging officer. His name written in the body of the certificate is not sufficient.

EJECTMENT. The facts are stated in the opinion.

Isaac Marston, for the plaintiff in error.

D. B. Duffield, and Green and Scofield, for the defendants in error.

By Court, CAMPBELL, J. Plaintiff brought ejectment, and in order to show title, offered to introduce the record of a deed from one Terissa Matevia to Louis B. Trombley, and to show that the grantee went into possession, claiming title under it. He also proposed to deduce title to himself from this grantee by virtue of a series of mesne conveyances. The record of the first deed was excluded as invalid, and the subsequent

conveyances were also ruled out for various reasons alleged, and plaintiff was therefore subjected to an adverse verdict.

The objection urged against the record of the original deed in the chain of title was, that it had no legal certificate of acknowledgment. The name of an acknowledging officer was inserted with a proper date in the certificate as having taken the acknowledgment, but he did not subscribe it, although his name appears as a subscribing witness. It is claimed by plaintiff that a certificate is lawfully signed, if the name is inserted in it by the proper officer, without any technical subscribing, on the same principle which made a signing good under some clauses of the statute of frauds, without a subscribing, where intended to serve as a complete execution of a written instrument.

We think the certificate of acknowledgment of a conveyance is not valid unless subscribed. We believe this to be the only safe rule on principle, and we regard it as clearly indicated by the words of the recording laws. It is a very common practice among conveyancers to insert the name as well as title of the acknowledging officer in the body of the certificate, and such certificates are very frequently prepared beforehand, so that he writes nothing but his signature. If his name were to be set at the head only, there could be no safeguard against additions to it, and under our laws, which make records *prima facie* evidence, the original could not always serve, or be found, to prevent frauds from being practiced with comparative impunity. And instead of being judicially informed that certificates have been commonly used without being subscribed, we know the general usage to have been the reverse. If such instances exist, they must in all probability have been the result of accident.

We are not left to any doubt on this subject by the laws themselves. Our statutes, which provide for acknowledgment, relate as well to acknowledgments out of the state as to those taken here. The terms applicable to domestic and foreign acknowledgments are almost verbally identical. But the statute, when providing for acknowledgment in other states, declares that they shall not entitle conveyances to be recorded without a certificate by a proper clerk or other person, setting forth, among other things, that "the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be," and "that he believes the signature of such person sub-

scribed thereto to be genuine": 2 Comp. Laws, sec. 2729. This provision has existed in substance from a very early period, and the legislature evidently took it for granted that all acknowledgments would be thus subscribed. This is also in accordance with the popular understanding of the place of a signature. The few exceptions which have been recognized have never recommended themselves to the judgment of the profession, and no unsubscribed signature has been allowed to stand as valid without satisfactory proof that the instrument was delivered by the signer as a binding act, and intended to be complete. There was never any general presumption of that kind, and should any such be now adopted, it could only work mischief.

As the only claim attempted to be shown was under this deed, and a possession taken by virtue of it, the subsequent conveyance could be of no importance in the case, if this should be ruled out. We therefore do not deem it important to consider the questions, which relate only to those, inasmuch as we think the court rightly excluded the first record.

The judgment should be affirmed with costs, and the record remanded.

The other justices concurred.

CERTIFICATE OF ACKNOWLEDGMENT OF DEED MUST BE SIGNED BY OFFICER:
Note to Livingston v. Kettelle, 41 Am. Dec. 173.

THE PRINCIPAL CASE IS CITED IN *Bigelow v. Booth*, 39 Mich. 624, to the point that the transcript of a justice's judgment should be officially signed by him. It is not enough that his name appears in the body of the certificate.

RYAN v. BROWN.

[18 MICHIGAN, 196.]

VOLUNTARY DEED, WITHOUT CONSIDERATION, CAN ONLY BE AVOIDED BY SOME ONE HAVING EQUITIES AGAINST IT.

OWNERSHIP OF LANDS UPON STREAM EXTENDS OVER ITS BED TO THE MIDDLE OF THE STREAM, UNLESS CLEARLY CONFINED WITHIN LESS LIMITS BY THE TERMS OF THE GRANT; AND THE COMPLETE CONTROL OF THE USE OF SUCH LAND COVERED WITH WATER IS IN THE RIPARIAN OWNER, EXCEPT SO FAR AS LIMITED AND QUALIFIED BY SUCH RIGHTS AS BELONG TO THE PUBLIC AT LARGE, TO THE NAVIGATION, AND SUCH OTHER USE, IF ANY, AS APPERTAINS TO THE PUBLIC OVER THE WATER.

UNITED STATES DID NOT AND COULD NOT GIVE STATE OF MICHIGAN ANY CONTROL OVER PRIVATE PROPERTY, UNDER 10 UNITED STATES STATUTES AT LARGE, 35, GRANTING THE STATE A STRIP OF LAND FOR CANAL PURPOSES THROUGH THE MILITARY RESERVATION AT SAULT STE. MARIE.

STATE CAN ONLY MAINTAIN PROPRIETARY RIGHTS OVER LANDS, upon proof of a valid grant, or legal appropriation upon an inquest in form of law.

SAULT STE. MARIE CANAL BOARD HAVE SUCH CONTROL OVER CANAL AND ITS APPROACHES as to be authorized to remove such obstructions as are unlawful; but they have no such judicial authority as to make their finding conclusive upon the fact of illegality, and if they interfere with private rights, they act at their peril, and are responsible for their conduct.

ERECTIONS BY RIPARIAN OWNERS IN WATERS WHOSE BEDS ARE PUBLIC PROPERTY ARE UNLAWFUL, not because they are nuisances, in the proper sense of the term, but because they are encroachments on the public domain; but where the ownership is private, and the public rights are simply easements or privileges, the owner may use the beds as he pleases, so long as it does not injuriously affect the public enjoyment; and his use is *prima facie* lawful.

EXTENT TO WHICH PRIVATE IMPROVEMENTS IN NATURAL WATERCOURSES IS COMPATIBLE WITH PUBLIC USE must depend upon circumstances, and always be a question of fact.

RIGHT OF PUBLIC FOR PURPOSES OF NAVIGATION MUST BE AFFURTHERMENT TO ORDINARY MEANS OF NAVIGATION; and it can, therefore, never be unlawful to erect such wharves and landings as will accommodate all vessels ordinarily using the stream, unless there are some exceptional circumstances which may render the structures improper.

ERECTIONS IN RIVER AT HEAD OF NAVIGATION, AND SERVICABLE TO NAVIGATION, DO NOT BECOME UNLAWFUL by the subsequent opening of a canal, which is in no sense a part of the river, but an independent waterway connecting the river above the falls with the stream below.

STATE HAS NO MORE RIGHT TO INTERFERE WITH PRIVATE PROPERTY WITHOUT COMPENSATION, to make or improve a canal, than it has for a road upon land.

STREAMS ONLY WHICH ARE WHOLLY WITHIN STATE ARE REFERRED TO by article 18, section 4, of the Michigan constitution of 1850, which declares that "no navigable stream in this state shall be either bridged or dammed without authority from the board of supervisors of the proper county."

EQUITY HAS JURISDICTION TO RESTRAIN TRESPASS calculated to do permanent damage to the freehold; and where it is an act of official oppression by public officers and agents, under color of office, a less grievance constitutes a ground for interference than where the trespass is by a private person.

BILL in chancery for an injunction. The facts are stated in the opinion.

Dwight May, attorney-general, for the appellants.

L. S. Trowbridge, for the appellee.

By Court, CAMPBELL, J. Complainant, being owner of certain dock property in the St. Mary's River at the foot of the rapids, and just below the canal entrance, had certain cribs, placed there by his grantor, intended as a foundation for additional docks on a line with the outer end of the old dock,

which last, after the canal was built, had presented an angle to the line of direction of the canal. The new docks, as projected, were intended to remove this angular projection, by building a dock in a line substantially coinciding in direction with the side of the canal as extended. The old dock, being at the head of river navigation, had its front at a considerable angle with the general direction of the stream, as the river widened out below the rapids, and vessels could proceed no farther up stream; and such a position was favorable to turning. When the canal was opened, vessels entering it would pass the outer point of the dock, and at certain stages of the wind might have found inconvenience, from being brought in contact with the angle, if of light enough draught to approach it. The new dock would have presented an even front parallel with the canal line.

The bill charged defendants with threatening and attempting to remove the cribs and the extremity of the original dock, and they justified as authorized to remove them as obstructions to navigation, their authority being an order of the canal board to that effect.

The answer does not show, and the proof very clearly disproves the fact, that the original or extended dock would have been any obstruction to the natural navigation of the river. It appears quite as clearly that the altered dock would have been more convenient for shipping after the canal was opened than the old one. And the testimony, so far as it shows any inconvenience to navigation as it stands, which is very slight, shows at the same time that the inconvenience would not have arisen except for the action of the defendants in dredging and removing the structures upon the premises concerning which the controversy arises. We think, if the questions in the case depended on the existence of a nuisance in fact to the improved navigation, that the facts show rather that a widening out of the canal entrance over these premises would be a desirable improvement, than that these docks, as left to be maintained under the decree of the court below, would amount to such nuisance. The circuit court dissolved the injunction as to the lower end of the proposed addition, which would have presented an angle at the east end (and concerning which there might have been more controversy, if the rights of the parties depend on the riparian theory asserted by the defense), and only maintained it as to the rest.

The answer set up, but without any proof on the subject,

that Ryan, the complainant, received his title from the former owner, Warner, without consideration, and upon a trust for his benefit. But defendants are in no wise concerned with such an inquiry; and a voluntary deed, without consideration, can only be avoided by some one having equities against it: *Jackson v. Cleveland*, 15 Mich. 94 [90 Am. Dec. 266].

The case, therefore, stands upon the rights of the complainant as a riparian owner, and those of the state as proprietor of the canal, and also as guardian of the rights of the public. And the defense rests, not only upon a general denial of the rights of riparian owners to improve their property by wharfage, but also upon an assertion of proprietorship in the state of the property embraced within a strip four hundred feet wide, which is claimed to extend down the river over the lands in dispute.

Unless very clearly confined within less limits by the terms of the grant, we have held the settled law of this state recognizes every ownership of lands upon streams as extending over their bed to the middle of the stream when it is a river. Any erection which can lawfully be made in the water within those lines belongs to the riparian estate. And the complete control of the use of such land covered with water is in the riparian owner, except as it is limited and qualified by such rights as belong to the public at large, to the navigation, and such other use, if any, as appertains to the public over the water: *Lorman v. Benson*, 8 Mich. 18 [77 Am. Dec. 435]; *Rice v. Ruddiman*, 10 Id. 125.

The complainant's title is not shown to have been restricted in any way, except as it would thus be subject to any rights of the public in the use of the stream. And so far as the strip of four hundred feet wide is concerned, it never approached this land. It is granted by the act of Congress providing for the canal as a part of the lands included in the military reservation through which the canal was to be built, the act giving the right of way, and granting that width of land for its location, and that of the necessary appurtenances: 10 Laws of United States, 35, 36. There is nothing in the act assuming to override any private rights, or to include in this grant any land outside of the reserve. It had been for many years a disputed point whether the state could cross the reserve without permission, and if it could, there might have been difficulties in the way of condemning land, not being a part of the ordinary domain, but set apart for public purposes, and sup-

posed to be withdrawn from plenary local jurisdiction. This grant removed any doubts upon this subject, but the United States did not and could not give the state any control over private property. That is always subject to the eminent domain for public improvements, and the state authority on that subject was already paramount; but in order to take property for public purposes, it must be paid for. And if the state should set up any proprietary rights over the property involved in this litigation, they can only be maintained upon proof of a valid grant, or legal appropriation upon an inquest in form of law.

The controversy, therefore, is narrowed down to the single inquiry whether the defendants are justified in removing the structures of complainant as unlawful obstructions to navigable water, and as nuisances which they are authorized under the direction of the canal board to abate.

That board has such a control over the canal and its approaches as to be authorized to remove such obstructions as are unlawful. But they have not, and could not have, any such judicial authority as to make their finding of any conclusiveness whatever upon the fact of illegality. Such action must be had at their peril, and can never justify themselves or others in interfering with any rights lawfully existing. They become wrong-doers as soon as they attempt to interfere with private property lawfully existing where they assail it.

The defendants claim that this property was in fact unlawfully placed in the stream, and within the jurisdiction of the board to remove. And it is asserted that every erection in the water is unlawful, as interfering with the right of navigation, which extends over the whole stream to the shore.

In those waters whose beds are public and not private property, erections by riparian owners are unlawful, not because they are nuisances in the proper sense of the term, but because they are encroachments on the public domain, and they are as unauthorized as would be the erection of houses or barns upon public land away from the water by an adjoining landholder. But where the ownership is private, and the public rights are simply easements or privileges upon it, the owner may do what he pleases, so long as it does not injuriously affect the public enjoyment. On land, where roads are laid out of a prescribed width, the law or the authorities having determined that width to be desirable, the right to encroach upon the way cannot be very extensive. But where the way exists

in a watercourse, whose boundaries are variable, and laid down without human intervention, the extent to which private improvements are compatible with the public use must depend upon circumstances, and must always be a question of fact. The owner's use is lawful until shown to be unlawful. It is plain enough that there are streams which cannot safely be encroached upon at all, while there are others so considerable that they could not be appreciably injured by a very extensive system of dockage, or other erections in their beds.

The rights of the public for purposes of navigation must be appurtenant to the ordinary means of navigation. Small boats can land where large ones do, but large ones cannot go where small ones can. It would be absurd to apply rules to the enjoyment of rights of navigation, as if canoes and scows, instead of ships and steamers, did the business of the country. If wharves and similar conveniences were not allowed upon our large streams, the shipping business would become practically worthless. It can never be unlawful for a landowner to make such wharves and landings as will accommodate all vessels ordinarily using the stream, unless there are some exceptional circumstances, as narrows, bends, or the like, which may in particular cases render his structures improper. Then the private right must yield to the public right. But where they do not conflict, there is no wrong done.

In the case before us, the original wharf went out into the stream as far as the proposed extensions. No vessel could pass above it, as it was just below the rapids, and was the extreme upper limit of navigation. For all practical purposes the navigable stream began there.

It is admitted that before the canal was built, the wharf was a necessity, and operated as a very great convenience to vessels. And from the end of the wharf to the old shore-line, even if it had been deep water, the space was not more than an ordinary steamer's length, while in fact the proof shows that it approached shoal water so nearly that at that point the water, which was deeper lower down, was too shallow to accommodate large vessels. There was nothing which could be called navigable water available above it.

This structure being lawful, and any additions which could have been made to it above being in no way adapted to interfere with navigation, the state undertook, not to improve the navigation of the river, which practically ended there,—the Sault being an insurmountable obstacle,—but to make an

artificial watercourse in the shape of a canal to connect the waters above the falls with the stream below. This canal is in no sense a part of the river. It is as distinct from it as if the waters it connects were two separate streams. The rapids severed the upper and lower waters as effectually as if they flowed in different channels. The canal is an independent water-way, like a turnpike, which can only be used upon such conditions as the state, under the congressional grant, might lawfully impose. The premises in question are not within it, and have never been assumed under the eminent domain for public use. The erections are not charged in the answer to obstruct any but canal navigation, and the proofs show that such is the only effect, so far as they are obstructions at all.

The state has no more right to interfere with private property without compensation, to make or improve a canal, than it has for a road upon land. And if the canal entrance is desired to be made wider, and the widening is over private property, which, in the absence of the canal, could have been kept improved without any impropriety, the state may unquestionably have it condemned by some process of law provided for the purpose, or may purchase it of the proprietor; but it cannot be taken arbitrarily. It is as much the owner's freehold as if it were upland.

It was suggested on the argument that these improvements were prohibited by section 4, article 18, of the constitution of 1850, which declares that "no navigable stream in this state shall be either abridged or dammed without authority from the board of supervisors of the proper county, under the provisions of law."

The constitution, as reported in its several stages, and as published, with the joint certificates of the secretary of state and Mr. Swegles, principal secretary of the convention, as having been enrolled and signed, uses the word "bridged" instead of "abridged," which latter is a word not commonly used in such connection: *Convention Debates*, xxxvii., 828, 830, 831, 909.

Whichever may be the correct reading, it is, we think, plain that this provision refers only to such streams as are wholly within the state, and which, at any given point, must be under the control of one or more boards of county officers, instead of in part subject to the jurisdiction of a foreign country, with which no board of supervisors could lawfully treat, or

hold any official intercourse. The provision was adopted as relating solely to our internal police, where the authorities, acting under state law, could entirely regulate the use of the stream for the purposes proposed.

It was also claimed that the injury complained of was not such as to authorize the interference of a court of equity. But where a trespass is calculated to do permanent damage to the freehold, the jurisdiction has always been exercised; and the circumstances of this case show that the injury must be very serious, if permitted. It is not necessary to consider the insolvency of the defendants, for the remedy does not depend upon it. The case also involves an abuse of authority by public officers and agents, under color of office; and ever since the case of *Osborn v. Bank of United States*, 9 Wheat. 738, it has been held that such official oppression would make it proper to interfere upon a less grievance than would justify proceedings on private misconduct, for reasons that are too obvious to require explanation. But, as before stated, the injury itself is, in this case, such as to give jurisdiction, independent of the position of the actors.

As complainant has not appealed, we cannot consider the propriety of the decree dissolving the injunction as to the cribs below the old dock. But the decree as made against the defendants must be affirmed, with costs.

CHRISTIANCY and GRAVES, JJ., concurred.

COOLEY, C. J., did not sit, having been of counsel.

VOLUNTARY DEED CAN ONLY BE AVOIDED BY SOME ONE HAVING EQUITIES AGAINST IT: *Jackson v. Cleveland*, 90 Am. Dec. 266; and see *Davidson v. Little*, 60 Id. 81.

RIPARIAN PROPRIETOR IS, IN GENERAL, ENTITLED TO LAND TO MIDDLE OF FRESH-WATER STREAM: *Walker v. Shepardson*, 65 Am. Dec. 324, and note; *Lorman v. Benson*, 77 Id. 435; *Rhodes v. Whitehead*, 84 Id. 631; *Ensminger v. People*, 95 Id. 495; *Berry v. Snyder*, 96 Id. 219; but see *Monongahela Bridge Co. v. Kirk*, 84 Id. 527; *Bainbridge v. Sherlock*, 95 Id. 644; subject to the easement of navigation of the public: *Davis v. Winslow*, 81 Id. 573, and note; *Ensminger v. People*, 95 Id. 495; *Berry v. Snyder*, 96 Id. 219, 226; and may erect wharves, if he does not thereby injuriously affect the rights of the public: *Walker v. Shepardson*, 65 Id. 324; *Ensminger v. People*, 95 Id. 495; *Bainbridge v. Sherlock*, 95 Id. 644; and see *City of Jeffersonville v. Louisville etc. Ferry Co.*, 89 Id. 495; compare *Dana v. Jackson Street Wharf Co.*, 89 Id. 164. The principal case is cited as follows on these points: A riparian proprietor owns to the center of the stream: *Watson v. Peters*, 26 Mich. 517; *Maxwell v. Bay City Bridge Co.*, 41 Id. 466; *Backus v. City of Detroit*, 49 Id. 114; and is entitled to every beneficial use thereof, subject to the public easement in

the same: *Fletcher v. Thunder Bay River Boom Co.*, 51 Id. 284; but where lots do not border on the stream at all, this common-law rule has no application: *Watson v. Peters*, 26 Id. 517.

TRESPASSES, WHEN ENJOINED IN EQUITY: See *Schurmeier v. St. Paul etc. R. R.*, 83 Am. Dec. 770; *Musselman v. Marquis*, 89 Id. 637; *Mayor etc. of Frederick v. Groshen*, 96 Id. 591. Equity will enjoin the commission of trespasses which would work irreparable injury: *Conrad v. Smith*, 32 Mich. 436, citing the principal case; and see also *Upjohn v. Board of Health of Township of Richland*, 46 Id. 545, citing the principal case.

LE ROY v. EAST SAGINAW CITY RAILWAY.

[18 MICHIGAN, 222.]

CORPORATION IS EXEMPT FROM ALL OTHER TAXES, where, by the laws under which it is incorporated, it is required to pay a certain annual specific tax on its paid-in capital, to be "in lieu of all other taxes upon all the property of said company."

STATUTE OF MICHIGAN PROVIDING THAT NO REPLEVIN SHALL LIE for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine, in pursuance of any law of this state, must be construed as applying only to cases in which a valid tax might, by legal possibility, have been imposed and collected by regular and proper proceeding under some statute authority.

TAX WARRANT, REGULAR ON ITS FACE, WILL NOT AFFORD TAX COLLECTOR PROTECTION in an action of replevin for property levied upon and taken by him to satisfy unauthorized taxes, although it would protect him from personal responsibility as a trespasser or wrong-doer.

ACTION OF REPLEVIN IS ALWAYS IN DETINET, under the statute of Michigan, whether the taking be wrongful or not; and where the taking is wrongful, and the plaintiff establishes his right to the property, the action cannot be defeated by a failure to make a prior demand.

REPLEVIN. The facts are stated in the opinion.

B. J. Brown, for the plaintiff in error.

Webber and Smith, for the defendant in error.

By Court, CHRISTIANCY, J. This was an action of replevin, brought by defendant in error, a corporation organized under chapter 71 of the Compiled Laws (to provide for the construction of train railways), and the acts of 1861 and 1863 amendatory thereof, against the plaintiff in error, who was marshal and collector of taxes of the city of East Saginaw, who had levied upon and taken the property in question under warrants attached to his rolls, to satisfy state and county taxes, as well as certain city and local taxes assessed against the defendants in error.

The affidavit on behalf of the company upon which the writ of replevin issued was, that the property "had not been taken for any tax, assessment, or fine levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of said East Saginaw City Railway, liable to execution," etc.

By the act under which the defendant in error was incorporated, the corporation was required to pay annually a specific tax of one half of one per cent on the whole amount of its capital paid in, which was to be paid to the state treasurer on the first Monday of July in each year. The specific tax (with which the assessor and collector of taxes had nothing to do, and no power to assess or collect) is by the statute declared to be "in lieu of all other taxes upon all the property of said company."

This is a public law, of which all are bound to take notice. We are aware of no law, and have been referred to none, under or by virtue of which the tax assessed upon this company (and which the defendant below was by his warrant commanded to collect) could have been imposed.

But it is insisted by the plaintiffs in error that the action of replevin for the property thus taken by him is forbidden by section 4 of chapter 152 of the Compiled Laws.

This section enacts that "no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine, in pursuance of any law of this state."

The main object of this statute would seem to have been to prevent delays in the collection of the public revenue, and to drive parties claiming property seized for the payment of taxes, etc., to some other remedy which should not, during the litigation, prevent the prompt collection of the tax: *People v. Albany*, 7 Wend. 485; *O'Reilly v. Good*, 42 Barb. 521; *Stiles v. Griffith*, 3 Yeates, 82.

To construe this provision as intended to apply only to cases in which the taxes—for which the property has been taken—have been imposed by authority of and full compliance with the statute authorizing any particular taxes, so as to render it a valid tax, in pursuance of such statute, would be to make the question of the maintenance of the replevin depend in all cases upon the validity of the tax to be determined upon the trial; and this would make the statute forbid only those actions of replevin which must equally have failed without the statute. On the other hand, to construe the stat-

ute as applying to a case in which there is no statute authority for the assessment and collection of any tax by the officers who may have undertaken to assess or collect one, and where no possible proceeding of such officers could have given them authority to impose or collect any tax under any statute of the state (or to a case where the property of some other person than the party taxed has been seized), would be to extend the statute to cases which do not come within its spirit or intent.

This provision must, therefore, be construed as applying only to cases in which a valid tax might, by legal possibility, have been imposed and collected by regular and proper proceeding under some statute authority. In this latter class of cases, this provision would prohibit the action of replevin, though the statute authority might not have been fully complied with, and the proceedings might have been so far irregular as to defeat a sale of real estate sold for such taxes.

It is urged, however, by the plaintiff in error, that, though he may have been bound to know the law, he was not bound to know the facts which did not appear on his rolls or warrants; that these did not show that the party taxed was a corporation, that it might have been a copartnership,—a fact to be determined by the assessors; and they having taxed the defendant on the rolls, he was bound to suppose the assessors had determined that the company was not a corporation, but a private association or partnership, and that he, the collector, was therefore protected by his warrants, which were regular on their face, not disclosing the illegality.

But the protection afforded on this ground does not go far enough to avail the collector in this action of replevin. It goes only to the extent of protecting him from personal responsibility as a trespasser or wrong-doer. It cannot be made the foundation of a right or claim against others, nor confer any right of or to property, which alone is in issue in an action of replevin. This point was expressly decided in *Beach v. Botsford*, 1 Doug. (Mich.) 199 [40 Am. Dec. 45].

As to the point raised by the plaintiff in error, that no demand for the property having been made before suit, this must be treated as an action of replevin in the *cepit*, which will only lie where trespass would lie, it is sufficient to say that the action of replevin, under our statute, is, in form, always in the *detinet*, whether the taking be wrongful or not; and that where the taking was wrongful as against the plaintiff, and he estab-

lishes his right to the property, his action cannot be defeated by the failure to make a prior demand, such failure not going to the right of action. This was so held by this court in *Trudo v. Anderson*, 10 Mich. 357, 369, 370 [81 Am. Dec. 795].

The judgment of the circuit court must be affirmed, with costs.

The other justices concurred.

CHARTER PROVIDING FOR EXEMPTION FROM TAXATION OF PROPERTY OF CORPORATION, EFFECT OF: See *Mott v. Pennsylvania R. R.*, 72 Am. Dec. 664, and note; *State v. Bank of Smyrna*, 73 Id. 699, and note.

TAX WARRANT, REGULAR ON ITS FACE, PROTECTS OFFICER: Note to *Sawacool v. Broughton*, 21 Am. Dec. 190; *Ford v. Clough*, 23 Id. 513; *Sprague v. Birchard*, 60 Id. 393, and note. The principal case is cited to this effect in *Bird v. Perkins*, 33 Mich. 32.

DEMAND, WHEN NECESSARY IN REPLEVIN: See *Trudo v. Anderson*, 81 Am. Dec. 795; *Butters v. Haughwout*, 89 Id. 401; *Oleson v. Merrill*, 91 Id. 428. The action of replevin originally was confined to a wrongful distress or taking, and no demand was ever necessary in such a case: *Adams v. Wood*, 51 Mich. 413, citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Morrison v. Cole*, 30 Mich. 105, to the point that an execution, if regular upon its face, will protect the officer when proceeded against as a wrong-doer, but it cannot be made the basis of a claim of right to the property seized, without proof of a valid judgment; in *Mathews v. Densmore*, 43 Id. 465, to the point that the first step in an officer's justification is to show, not merely a writ, but a valid writ; in *McCoy v. Anderson*, 47 Id. 505, *Hill v. Wright*, 49 Id. 231, to the point that the prohibition of section 6729, Michigan Compiled Laws, against bringing replevin for property taken under a tax warrant, does not apply where there was no jurisdiction to levy the tax, or where the levy is unlawful on its face; and see *Pullan v. Knisinger*, 2 Abb. 102.

ABELL v. MUNSON.

[15 MICHIGAN, 306.]

MEANING, EXTENT, AND TRUTH OF REPRESENTATIONS MAY BE PROPERLY LEFT TO JURY, where there is evidence that a party, on transferring the note of a third person, represented it to be "as good as cash, and that the maker was perfectly responsible," and also that it was understood that the note was not to be presented at once.

CONTRACT REQUIRED BY STATUTE OF FRAUDS TO BE IN WRITING CANNOT BE SUBSEQUENTLY MODIFIED BY PAROL; and where the time of performance is fixed by such contract, there can, therefore, be no inquiry concerning a reasonable time for performance.

EVIDENCE OF VALUE OF LAND SHORTLY AFTER IT SHOULD HAVE BEEN CONVEYED IS ADMISSIBLE to show what its value was at that time, in an action for breach of contract to convey.

ACTION to recover damages for not conveying certain land according to contract. The opinion states the facts.

Moore and Griffin, and H. Balus, for the plaintiff in error.

H. M. and W. E. Cheever, and Vining and Minnock, for the defendant in error.

By Court, CAMPBELL, J. Munson sued Abell for not conveying certain property, according to agreement. The defense was, that the agreement was obtained by fraud, and without consideration, and also that there had been no default, or none which had not been waived by subsequent agreement.

The consideration paid in advance was a note against one Philetus Howe. Abell claimed and testified that Munson represented this note to be "as good as the cash, and that the maker was perfectly responsible." He testified further, that Munson desired him not to call upon Howe for three or four months. He further testified to calling on Howe, and being informed by him of his insolvency, and to several interviews with Munson in regard to the matter, and to a joint interview of both with Howe. Howe's testimony showed that he was not insolvent.

It is unnecessary to refer at length to the facts on this part of the case, as the charges show sufficiently upon what footing the court left it.

The judge charged that no recovery could be had if the note was taken on Munson's representations, and if those representations were untrue, whether he knew their untruth or not. He told the jury that it was for them to determine what was meant by the representations sworn to, and that Abell had a right to rescind within a reasonable time for fraud, if existing, and that he would not be prejudiced by any delay in rescinding caused by the fault of Munson. What was reasonable time, he left to the jury, under the circumstances, there being directly contradictory testimony upon all these points.

The rulings of the court in these matters were quite as liberal as Abell could ask. They were some of them based on assumptions which contradicted the written agreement, and which were not admissible. We think there was no error in this part of the case against the rights of Abell.

We think, also, that all the difficulties urged concerning the contract itself, and its breach, arise from the court below allow

ing a more liberal treatment to plaintiff in error than he was legally entitled to. When the contract is viewed in its true legal aspect, the objections all become incompetent.

The agreement is in writing, dated June 10, 1867, reciting the receipt of the Howe note as an absolute payment for the land contracted, and agreeing to convey "lot numbered 16 in the village of Wayne, in O. C. Abell's addition to said village, and according to the plat thereof," and to execute a good and sufficient warranty deed "as soon as said party of the first part gets said plat surveyed and recorded." The contract further stipulated that Munson should have possession on the first day of September, 1867.

There was testimony tending to show that, while the contract was agreed upon at its date, and the consideration then paid, yet in fact it was delivered some three months after its date, but dated back by agreement. And the defense consisted in the claim that there was no liability until a survey and plat had been actually made, and also that Abell had used diligence to procure a survey, and that Munson had so acted as to extend the time of performance at various periods.

The statute of frauds requires every contract for the sale of lands to be in writing, and signed by the party making the sale: 2 Comp. Laws, sec. 3179. The rule prohibits any enforcement of parol contracts; and while written contracts, which would have been lawful if unwritten, may be modified by parol, subsequently, in many cases, yet this cannot be done where the law requires the agreement to be in writing: *Goss v. Lord Nugent*, 5 Barn. & Adol. 58; *Stowell v. Robinson*, 3 Bing. N. C. 928; *Stead v. Dawber*, 10 Ad. & E. 57; *Marshall v. Lynn*, 6 Mees. & W. 109; *Blood v. Goodrich*, 9 Wend. 68 [24 Am. Dec. 121]. And our statute goes further than the English statute, by making the contract void, instead of declaring that no action shall lie upon it.

We cannot look outside of the written contract to ascertain anything which is fixed by it. And if the time of performance is absolutely fixed by agreement, there is no room left for the inquiries concerning reasonable time which the court allowed to be made, and for its rulings concerning which most of the errors are assigned.

The agreement that Munson should take possession on the 1st of September necessarily implies that the plat shall have been made previously, for otherwise there could be no identification. As the land had been already paid for, any long

delay would have been unreasonable, and we must regard this date as the one fixed by the parties themselves. And if the contract was actually delivered afterwards, inasmuch as the vendor chose to execute a document which contained such a provision, he was bound to convey at once. There was no condition to be performed on the other side, for the land was fully paid for, and under such circumstances he was the only party bound to perform. The whole inquiry concerning reasonable time was irrelevant, and the rulings were more favorable to Abell than he had any right to request.

The plaintiff below, Munson, testified to a demand made in the spring of 1868, and that the property was then worth about \$150; and other witnesses testified to its value at that time. It is objected that this testimony was irrelevant. We do not think this objection valid. Assuming the first failure to have been on the first day of September, or when the contract was delivered, if after that time, we cannot regard such evidence of value at a time so little distant, as not admissible to show what was the value of the land previously. The law has no presumptions on the subject of changeable values in real estate, and such proof, though liable to be overcome by evidence of a previous change in the interval, is not too remote. These things must be looked at in a common-sense light, and as they would be regarded by ordinary men interested in such transactions. While land does undoubtedly change values, yet it does not usually, unless in some peculiar localities, fluctuate so rapidly as to render evidence extending over a few months entirely useless as a criterion.

If the court had declared this evidence conclusive, and had shut out evidence of value at other periods, it might have become necessary to consider whether, after the time for performance had elapsed on a land contract, the New York rule, requiring a demand before action, should be recognized, or would apply where no tender is needed, as in a case like the present, where the consideration had all been paid in advance: See *Connelly v. Pierce*, 7 Wend. 129; *Blood v. Goodrich*, 9 Id. 68 [24 Am. Dec. 121]. As the case stands, we do not feel called upon to consider the force or necessity of a demand, as fixing the date of liability for non-performance.

The case is a very clear one, and the only error that we can discover is, that the plaintiff below conceded, and the court adopted, a series of admissions of legal privileges, to which

defendant below was not entitled. These are not errors of which he can complain in this court.

The judgment must be affirmed, with costs.

The other justices concurred.

ALTERATION OF CONTRACT WITHIN STATUTE OF FRAUDS BY SUBSEQUENT VERBAL AGREEMENT. — Whether the rule of the common law that contracts in writing, with perhaps the exception of specialties, may be modified or discharged by subsequent verbal agreements of the parties, applies to those contracts required by the statute of frauds to be written, is a question upon which judicial opinion is conflicting. The leading text-writers seem to be unanimous in their belief that such contracts cannot afterwards, as a general proposition, be orally varied: 1 Addison on Contracts, Abbott's ed., *201; 1 Chitty on Contracts, 11 Am. ed., 154; Bishop on Contracts, sec. 771; Fry on Specific Performance, 3d Am. ed., sec. 777; Browne on the Statute of Frauds, secs. 411 et seq.; 2 Reed on the Statute of Frauds, secs. 454 et seq.; and the supreme court of the United States has expressed itself the same way: *Emerson v. Slater*, 22 How. 28, 42; *Swain v. Seamens*, 9 Wall. 254, 272. Certainly, upon principle, exceptional conditions of circumstances should appear to warrant courts in upholding subsequent alterations of contracts within the statute. When the question was presented to Lord Ellenborough, in the early case of *Cuff v. Penn*, 1 Maule & S. 21, he held that the time of performance of a written contract for the sale of chattels, within the statute of frauds, might be enlarged by a subsequent verbal agreement; that the original contract continued, and there was only a substitution of different days of performance. The doctrine of this case has been either expressly or tacitly adopted by numerous cases in this country, in which it has been held that the time of payment, or of performance of contracts, within the statute, may be changed by parol: *Cummings v. Arnold*, 3 Met. 486; S. C., 37 Am. Dec. 155; *Stearns v. Hall*, 9 Cush. 31; *Vanhouten v. McCarty*, 4 N. J. Eq. 141; *Tompkins v. Tompkins*, 21 Id. 338; *Sharp v. Wyckoff*, 39 Id. 376, 379; *Stryker v. Vanderbilt*, 25 N. J. L. 482; *Bever v. Butler*, Wright (Ohio), 367; *Negley v. Jeffers*, 28 Ohio St. 90; *Marsh v. Bellew*, 45 Wis. 36; *Reed's Heirs v. Chambers*, 6 Gill & J. 490; *Keating v. Price*, 1 Johns. Cas. 22; the action, however, being brought upon the written contract: *Whittier v. Dana*, 10 Allen, 326; and although in some of the foregoing cases the original contract was under seal. "The statute requires a memorandum of the bargain to be in writing, that it may be made certain," says Wilde, J., in *Cummings v. Arnold*, *supra*; "but it does not undertake to regulate its performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. That is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts." On the same principle, a vendor's stipulation to remove encumbrances from the land sold may be waived by the vendee by a subsequent parol agreement: *Negley v. Jeffers*, 28 Ohio St. 90; *Devling v. Little*, 26 Pa. St. 502; but see *Espy v. Anderson*, 14 Id. 308; and a written contract by which the parties agreed that certain referees should settle a disputed boundary line, and that quitclaim deeds should be executed by each to the other, may be modified by a subsequent verbal agreement that no deeds should be given: *Buel v. Miller*, 4 N. H. 196; so an oral agreement to reduce the rate of interest on a mortgage, and to pay it semi-annually, instead of annually, made after the mortgage became due, was upheld in *Sharp v.*

Wychoff, 39 N. J. Eq. 376; but in any event, "a verbal agreement, to be effectual and binding, as an alteration of the express terms of a prior written contract between the parties, must be supported by a new and valid consideration. A mere executory contract of the kind, to constitute an exception to this rule, must have been acted upon so far that a refusal to carry it out would work a fraud on one of the parties": *Thurston v. Ludwig*, 6 Ohio St. 1.

Subsequent English cases, as well as cases in other states, more in accordance with principle, have refused to follow the doctrine of *Cuff v. Penn*, *supra*, and have held that the time of payment or performance cannot be modified by a subsequent verbal agreement: *Stowell v. Robinson*, 3 Bing. N. C. 928; S. C., 5 Scott, 196; *Stead v. Dawber*, 10 Ad. & E. 57; *Marshall v. Lynn*, 6 Mees. & W. 109; *Gtraud v. Richmond*, 2 Com. B. 835; *Emmet v. Dewhurst*, 3 Macn. & G. 587; *Noble v. Ward*, L. R. 1 Ex. 117; in error: L. R. 2 Ex. 135; *Fleming v. Gilbert*, 3 Johns. 528; *Hasbrouck v. Tappen*, 15 Id. 200; *Blood v. Goodrich*, 9 Wend. 68; S. C., 24 Am. Dec. 121; *Ladd v. King*, 1 R. I. 231; S. C., 51 Am. Dec. 624; *Cook v. Bell*, 18 Mich. 387. "There are cases when the time of performance of a written contract may be enlarged by parol," says Savage, C. J., in *Blood v. Goodrich*, *supra*, "but, I apprehend, that doctrine does not apply to contracts for the conveyance of land, or to any other contract, where the contract itself would not have been valid if made by parol." The subsequent parol agreement does not operate either as a rescission of the original contract, or as a new contract, and the original contract may therefore be enforced: *Noble v. Ward*, *supra*. But parol extensions of time to remove growing timber, under a contract for the sale and removal thereof, whether valid under the statute of frauds or not, are good as licenses, so far as they are acted upon: *Haskell v. Ayres*, 35 Mich. 89. In accordance with this latter view, also, where the plaintiff contracted in writing to sell the defendant several lots of land, and to make a good title thereto, oral testimony of the defendant's waiver of his right to have a good title made out as to one of the lots was held inadmissible, in the leading case of *Goss v. Lord Nugent*, 5 Barn. & Adol. 58; compare *Negley v. Jeffers*, 28 Ohio St. 90; *Devling v. Little*, 26 Pa. St. 502; and where a written agreement by one party to give and the other to take a lease of lands, provided for a mode of valuation of straw, etc., on the premises, when possession was given the lessee, it was held that the parties could not verbally waive the mode of valuation, although such part of the agreement might have been good without writing: *Harvey v. Grabham*, 5 Ad. & E. 61; compare *Stark v. Wilson*, 3 Bibb, 476; so where a contract for the sale of land specified a certain person who was to survey the land, oral evidence is inadmissible to show a change by substituting another person: *Dana v. Hancock*, 30 Vt. 616. Again, a written contract within the statute, for the sale of goods, specifying the manner of delivery, cannot be altered by a subsequent parol agreement to deliver in a different manner: *Moore v. Campbell*, 10 Ex. 323; nor can such a contract for the sale of merchandise be altered by a parol agreement increasing the quantity to be delivered: *Schultz v. Bradley*, 57 N. Y. 646; and where a written contract, within the statute, for the sale of straw, provided that it should be free from weeds, the vendor cannot show, in an action against the vendee for non-acceptance, that the vendee subsequently verbally agreed to waive such provision: *Brown v. Sanborn*, 21 Minn. 402. Under section 2794 of the Georgia Code of 1873, requiring contracts of insurance to be in writing, subsequent agreements to alter such contracts must also be in writing: *Simonton v. Liverpool etc. Ins. Co.*, 51 Ga. 76; *Mitchell v. Universal L. Ins. Co.*, 54 Id. 289.

Some of the most recent English cases, while approving earlier ones, to some extent limit their doctrines. Thus where parol evidence goes to show, not a new contract, but simply a voluntary forbearance by the vendee, at the request of the vendor, as to the delivery of goods agreed to be sold, the statute, it is held, does not apply in an action by the vendee for breach of contract: *Ogle v. Earl Vane*, L. R. 2 Q. B. 275; in error L. R. 3 Q. B. 272; and the departure by a vendor of goods from the terms of the original contract, within the statute of frauds, as to the route over which the goods were to be sent, may be ratified by the vendee without writing: *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140; so where a vendor, under a written contract of sale of iron, of a greater value than ten pounds, voluntarily withheld delivery at the request of the vendee, no new contract being substituted for the original one, the vendor is entitled to maintain an action for breach of contract: *Hickman v. Haynes*, L. R. 10 C. P. 598, 605, Lindley, J., saying: "The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance, is, to say the least, very startling, and if well founded will enable the defendants in this case to make use of the statute of frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the court to countenance such a doctrine. The statute of frauds contains no enactment to the effect contended for. The utmost effect of the seventeenth section is to invalidate any verbal agreement for the sale of goods in certain cases; and even if a verbal agreement for extending the time for the delivery of goods already agreed to be sold is within the statute, the plaintiff in this case is not attempting to enforce any such verbal agreement, but is suing on the original agreement which was in writing." After reviewing the cases of *Noble v. Ward*, L. R. 1 Ex. 117, in error L. R. 2 Ex. 135, *Stead v. Dauber*, 10 Ad. & E. 57, *Marshall v. Lynn*, 6 Mees. & W. 109, *Goss v. Lord Nugent*, 5 Barn. & Adol. 58, and *Stowell v. Robinson*, 3 Bing. N. C. 928, referred to above, the judge continues: "The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the statute of frauds. But so far as this principle has an application to the present case, it appears to us rather to preclude the defendants from setting up an agreement to enlarge the time for delivery in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it. There was, in truth, in this case no binding agreement to enlarge the time for delivery." But if it does not appear that the vendors, under a written contract for the sale of chattels, within the statute of frauds, withheld delivery in accordance with the terms of the contract, at the request of the vendee, they cannot maintain an action upon the original contract for non-acceptance, nor can they rely upon the verbal assent of the vendee to a substituted time of delivery: *Plevins v. Downing*, L. R. 1 C. P. D. 220.

The following cases illustrate special points: Where a contract not reduced to writing is taken out of the operation of the statute of frauds by the payment of earnest-money, it is held not to contravene the spirit or policy of the statute to allow its terms to be varied by parol in respect to the time of performance: *Packer v. Steward*, 34 Vt. 130; and where no time for the delivery of goods sold under a written contract within the statute is fixed, evidence may be received to show that it was afterwards agreed upon by parol: *Neil v. Cheves*, 1 Bail. 537. If parol variations of a written con-

tract within the statute have been so acted upon that the original contract cannot be enforced without injury, this may constitute a defense to a suit in equity thereon: *Price v. Dyer*, 17 Ves. 356; *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332, 337. Upon a bill praying the performance of a written contract for the purchase of lands, but offering the defendant the benefit of certain variations contained in an unsigned memorandum of a subsequent date, the court will decree a specific performance of the contract with those variations, if the defendant elect to take advantage of them; and if he does not so elect, it will decree a specific performance of the original contract: *Robinson v. Paige*, 3 Russ. 114.

While it is thus seen that according to the weight of authority a written contract within the statute of frauds cannot be modified by a subsequent verbal agreement, it is very generally held that an oral discharge or rescission is valid: 2 Reed on the Statute of Frauds, sec. 461; Browne on the Statute of Frauds, sec. 434-436; *Price v. Dyer*, 17 Ves. 356; *Goss v. Lord Nugent*, 5 Barn. & Adol. 58, 65; *Clifford v. Kelly*, 7 Ir. Ch. 333; *Johnson v. Worthy*, 17 Ga. 420; *Howard v. Gresham*, 27 Id. 347; *Morrill v. Colehour*, 82 Ill. 618, 625; *Norton v. Simonds*, 124 Mass. 19; *King v. Morford*, 1 N. J. Eq. 274; *Long v. Hartwell*, 34 N. J. L. 116; *Stevens v. Cooper*, 1 Johns. Ch. 425, 429; S. C., 7 Am. Dec. 499, 502; *Dearborn v. Cross*, 7 Cow. 48; *Baldwin v. Salter*, 8 Paige, 473; *Guthrie v. Thompson*, 1 Or. 353; *Ong v. Campbell*, 6 Watts, 392; *Boyce v. McCulloch*, 3 Watts & S. 429; *Lauer v. Lee*, 42 Pa. St. 165; *Phelps v. Seely*, 22 Gratt. 573; compare *Goucher v. Martin*, 9 Watts, 106; *Cravener v. Bowser*, 4 Pa. St. 259; *Espy v. Anderson*, 14 Id. 308; *Maxwell v. Wallace*, Busb. Eq. 251; *Dial v. Crain*, 10 Tex. 444; *Huffman v. Hummer*, 18 N. J. Eq. 83, 89; although under seal: *Beach v. Cowillard*, 4 Cal. 315; *Johnson v. Worthy*, 17 Ga. 420; but the subsequent parol agreement must be executed: *Jeune v. Osgood*, 57 Ill. 340; *Mathison v. Wilson*, 87 Id. 51; *Johnson v. Worthy*, 17 Ga. 420; *Long v. Hartwell*, 34 N. J. L. 116; *Phelps v. Seely*, 22 Gratt. 573; and the waiver must be clearly proved: *Robinson v. Page*, 3 Russ. 114, 119; *Clifford v. Kelly*, 7 Ir. Ch. 333; *Lauer v. Lee*, 42 Pa. St. 165. The reason of this rule seems to be founded in the purely defensive character of the oral agreement.

THE PRINCIPAL CASE IS CITED in *Cook v. Bell*, 18 Mich. 393, to the point that no change can be made by parol in a contract for the sale of lands, which would not, so far as it extended, leave a part of the contract itself in a shape forbidden by the statute of frauds; in *Palmer v. Marquette etc. Rolling Mill Co.*, 32 Id. 275, to the point that a memorandum under the statute of frauds cannot, when essentially defective, be aided by parol evidence; in *Maynard v. Brown*, 41 Id. 298, to the point that a written agreement for the conveyance of land is void under the statute of frauds, if not signed by the party by whom the sale was to be made; and in *Blackwood v. Brown*, 32 Id. 107, to the point that what certain statements tend to prove, or the weight to be given them, are proper questions for the jury.

PATTEN v. PEOPLE.

[12 MICHIGAN, 214.]

PROCEEDINGS AND OBJECTS OF ASSEMBLAGES, the provocation thereby to the defendant, and his action in opposition to them, constitute, together, one entire transaction, in a prosecution for homicide, where it appeared that the riotous assembly, resulting in the homicide, grew out of and was directly connected with one that had assembled at the same place the night before, with the same object.

PROSECUTION IN TRIAL FOR HOMICIDE HAS NOT ONLY RIGHT, BUT IS UNDER DUTY TO SHOW GENERALLY TRANSACTION, as a whole, surrounding the killing, its nature and its objects, whether tending to show the guilt or innocence of the defendant, where the homicide resulted from certain assemblages and their riotous conduct; and whether the prosecution does this or not, the defendant has a right, either by cross-examination or by his own witnesses, to go fully into the matters thus constituting the *res gestæ*.

STATEMENTS OF WITNESS RELATE TO RES GESTÆ, AND THEIR CONTRADICTION IS THEREFORE COMPETENT, where, after having testified for the prosecution, in a trial for homicide, in reference to the proceedings of a riotous assemblage connected with the killing, as a member thereof, denied, on cross-examination, that he had stated to different persons, shortly after, that he was present as a mere looker-on, and took no part in it whatever.

HOMICIDE IS NOT EXCUSED IN ATTEMPTING TO COMPEL RIOTOUS ASSEMBLAGE about defendant's dwelling-house in the night-time to leave, where no violence had been done or attempted by them against either the house or the inmates.

CONDUCT OF DEFENDANT TOWARDS RIOTOUS ASSEMBLAGE ABOUT HIS DWELLING-HOUSE IS EXCUSED to the same extent as if the danger thereby to his mother's life had resulted from an actual attack upon her person, or the like danger to the defendant from an attack upon him, where, from his mother's feeble health, the defendant might well have apprehended that her life was endangered by the riotous proceedings, and if the rioters were informed of her condition, or if all reasonable and practicable efforts had been made to notify them of the fact.

DEFENDANT IS EXCUSABLE IN ACTING ACCORDING TO SURROUNDING CIRCUMSTANCES AS THEY APPEARED TO HIM; and if, from those circumstances, he believed there was imminent danger of death, or great bodily harm to himself or any member of his family, and had tried every other reasonable means which would, under the circumstances, naturally occur to a humane man to repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and if such means resulted in the death of any of the supposed assailants, the homicide is excusable.

INDICTMENT for murder. The evidence of the prosecution showed that, on the night of December 17, 1867, from eight to fifteen persons went to the house of the defendant, who was married a few days before, and who lived with his father and mother, for the purpose of "horning" him. They commenced

shooting guns, blowing horns, ringing bells, and yelling, and the defendant came out and ordered them to leave, and they ran off. On the following day, the deceased, Elias Cowles, went to a number of boys and young men, and induced them to "horn" the defendant the next night. Cowles was elected captain. They went into the yard of the defendant's premises, and began firing guns, blowing horns, etc. The defendant came out with an ax, and struck Cowles with it, injuring him so severely that he died the following day. Some of the rioters testified that their only object in going upon the defendant's premises was to "horn" the defendant. The defendant offered to show, on cross-examination, that, at the time the rioters made the arrangement to assemble on the second night, it was said by them that the running away the night before was a cowardly act, and that they were going to get a company together who would stand their ground, and that Cowles had said substantially the same thing to one of the witnesses; but the court refused to permit the evidence. The court also refused to allow the defendant to contradict one Henry Butler, a rioter, who testified for the prosecution as to certain statements which appear in the opinion. The evidence of the defendant showed that his mother was in feeble health, and had for many years suffered from palpitation of the heart and dizziness, and any unusual excitement produced serious results. Before the defendant stepped out, there were threatening cries among the rioters to "bring him (or fetch him) out," or to "bring (or fetch) them out." He went to the door and ordered off the rioters, but they paid no attention to him. He took the ax for the purpose of self-defense, and stepped out to induce the rioters to leave. Several voices cried, "Kill him, damn him, kill him," and rushing towards him, some one or more of them hit him with a gun or club, or other weapon. He then struck the deceased, and went into the house. Several gun-wads were fired through the open door, when the defendant and his father and mother were ordering the rioters off. A number of questions, which are sufficiently indicated in the opinion, were raised upon the charge to the jury. The defendant was convicted of manslaughter.

M. E. Crofoot, for the plaintiff in error.

Dwight May, attorney-general, for the people.

By Court, CHRISTIANCY, J. The evidence on the part of the prosecution, as well as that on the defense, showed very clearly

that the riotous assembly which gathered about the house of the defendant on the night of the homicide grew out of, and was directly connected with, that which had assembled there the night before, and had the same object in view; that Cowles, the deceased, on the day intervening, went around to several boys and young men to induce them to go the next (second) night; that he was active in getting up this second riotous assemblage, and was elected their captain. All the proceedings and objects, therefore, of both assemblages, the provocation thereby to the defendant, and his action in opposition to them, constituted, together, one entire transaction, or the *res gestæ*. And as it was also clear that the homicide, whatever its legal character, resulted from these assemblages, and their riotous conduct, and would not otherwise have occurred, it was not only the right, but the duty, of the prosecution to show generally the transaction as a whole, its nature and its objects, whether its tendency should be to show the guilt or innocence of the defendant: *Maier v. People*, 10 Mich. 212 [81 Am. Dec. 781]; *Brown v. People*, 17 Id. 429 [97 Am. Dec. 195]. This was not only necessary in fairness to the prisoner, but to enable the jury, from a view of the whole, to estimate and apply each particular item of evidence which might be adduced in any stage of the case.

But whether the prosecution did this or not, it was the clear right of the defendant, either by cross-examination or by witnesses introduced in his defense, to go fully into all matters thus constituting the *res gestæ*. He could not be bound by the showing on the part of the prosecution, but was at liberty to show that the transaction, as a whole, or in any of its parts or purposes, was different from that shown by the prosecution. And for this purpose it was competent for him to show any act or declaration of any individual of either assemblage in furtherance of the common object, or in reference to it, from the inception to the close of the transaction, their combination or concert having already sufficiently been shown.

The defendant undertook to do this by the cross-examination of the prosecutor's witnesses, and the proposed cross-examination was strictly legitimate under any rule ever applied to cross-examination, as it related directly to matters called out on the direct examination. The prosecutor's witnesses, some of the rioters themselves, had already given evidence tending to show that the only object of the rioters was to go upon the defendant's premises for the purpose, as they expressed it, of

"horning the defendant," who had lately been married, and that they contemplated no violence or injury to person or property. The defendant offered to show, on cross-examination, that, at the time the rioters made the arrangement to assemble the second night on the defendant's premises, their running away the night before was talked of by them, and was called a cowardly act; that they were going to get a company together that (second) night, who were not afraid, and would stand fire, and stay on the premises, and horn the defendant, whether he liked it or not, and that they would not go off the premises or be driven off.

This cross-examination the court erroneously refused to permit; and the error would not have been less had the defendant offered to show the same facts by witnesses of his own.

The court equally erred in refusing the defendant the right to show that Cowles, the deceased, had said substantially the same thing to one of the witnesses on the part of the prosecution.

Henry Butler, who was one of the rioters on the first night (though not upon the second), and who had testified fully on the part of the people in reference to the proceedings of that night, and had also testified that defendant had confessed having struck the deceased three times on the last night, was asked, on cross-examination, whether he did not, at the house of Mrs. Barret, a few nights after, state to her that he was not there the first night as one of the company of the horners, but that he happened there as a mere looker-on, and took no part or lot in it whatever, — to which he answered in the negative. Similar questions were asked him as to similar statements to other persons, — all which he denied. These questions were avowedly asked for the purpose of laying a foundation for impeaching him, by showing that he had made statements out of court, in reference to the matter, different from those now made under oath.

The court, holding that such statements, if made, related to matters wholly collateral, and not to the *res gestæ*, refused to allow the defendant to contradict him, by showing that he had made statements which he denied having made. This was also erroneous. The statements related to the *res gestæ*, and the proposed contradiction, if shown, would have tended seriously to weaken his credibility.

Various questions were raised upon the charge to the jury, and several special requests were made by defendant to charge

upon specific points, some of which were refused or charged in a modified form, and some were based upon hypotheses not warranted by any evidence in the cause.

We think it better to indicate what should have been the principles of the charge, as a whole, upon the points in dispute than to consider the detached parts presented by the several requests to charge, which would tend rather to confuse than elucidate the real questions involved.

No fault seems to have been found with the charge as it related to the distinction between murder in the first and second degree, or between murder and manslaughter.

The object of all the defendant's special requests was to obtain from the court a charge which should authorize or require the jury, upon certain supposed states of fact, to find the killing excusable homicide.

A correct idea of excusable homicide is not, perhaps, easily expressed by a brief abstract definition, without special reference to the facts of particular cases. We accordingly find the latter mode adopted in all the books. It has been thought safer to illustrate by particular instances than to undertake to define in advance all the particular elements or combinations of facts which may render homicide excusable.

Of course, the enumeration of particular cases does not exclude any others falling within the like principles.

But the principles which underlie and result from all the cases in which the homicide has been held excusable in self-defense, or in defense of one's family or persons standing in particular relation to him, or of his property, are so fully and accurately stated in the opinion of my brother Campbell, in *Pond v. People*, 8 Mich. 150, that an attempt to enumerate them here would be a mere repetition. The principles there laid down apply equally to the present case upon certain states of fact which it was competent for the jury to find from the evidence.

That case, however, differed from the present in certain important particulars. There an actual attack upon the defendant's dwelling was going on, and the rioters were in the act of demolishing it, and a servant of the defendant, then in the house, was being violently, and, to all appearances, dangerously assailed when the fatal shot was fired.

In the present case, no actual attack had been made upon the defendant's house,—no forcible attempt to enter; and unless the defendant, when he stepped out of the house with the ax,

was, as in his statement he claimed to be, actually struck by some one or more of the rioters, there was no actual attack made upon the defendant, or any one of his family. There was, however, evidence tending to show that, when the door was standing open, and the defendant and his father and mother were ordering the rioters off, the wads from some of the guns were fired into the house. The evidence also tended to show that the defendant knew or understood that the general and original object of the rioters in assembling there was to annoy him and his family by the blowing of horns, ringing of bells, firing of guns loaded only with powder and wads, and by other noises, rather than personal injury to himself or any of his family. But there was also evidence that, before the defendant stepped out, there were threatening cries among the rioters to "bring him (or fetch him) out," or to "bring (or fetch) them out," which must have referred to the defendant, and perhaps to his wife, and possibly to his father and mother.

Considering the case, first, with reference only to the facts existing prior to the time when the defendant went out with the ax, and without reference to the peculiar effects produced by the conduct of the rioters upon his mother, there was nothing, I think, in the evidence fairly tending to show a state of facts which would justify or excuse the defendant in rushing out and attacking any of the rioters with an ax, or other dangerous weapon, for the purpose of compelling them to desist or leave, though he might have been excused for attempting to drive them off by force, and even by blows with any instrument not calculated to endanger life or limb. But though from the sudden, violent, and capricious impulses to which an excited mob is always subject, danger may always be naturally apprehended, especially about a man's dwelling at night, whatever the original object of the assemblage may have been,—and no one can estimate the nature or extent of the danger,—yet, until some actual violence had been done or attempted in this case against, either the house or its inmates, the necessity which alone could excuse taking the life of any of the assailants had not yet occurred, and might never occur. And though the defendant had the right to act under the circumstances as they appeared to him, yet, up to this point (without reference to the defendant's mother), there was nothing in the circumstances which fairly tended to show that he could have believed the dire necessity to have arisen.

2. We will next inquire how far the case may be affected by

the peculiar effects produced upon the defendant's mother by the conduct of the rioters.

There was evidence from which the jury might have found that, owing to the feeble health of the mother and her peculiar infirmities, the fear and excitement caused by the conduct and threats of the rioters produced upon her alarming effects, from which the defendant might well have apprehended her speedy death, if such conduct were allowed to continue. But to render this available to the defendant as an excuse for the homicide, the jury should also find that the rioters were informed of this condition of the mother, and the effects produced by their conduct, or that every reasonable and practicable effort had been made to notify them of the facts, as such are not the ordinary effects of such causes upon people generally, and therefore would not naturally be anticipated by the rioters. But if they had such notice, or the defendant was prevented from giving it by the noise and tumult of the rioters, then I can see no sound reason why the danger to the mother from their conduct should not have excused the conduct of the defendant towards them to the same extent as if the danger to her life had resulted from an actual attack upon her person, or the like danger to the defendant from an attack upon him. And the defendant would, I think, have the right to resort to the same means of protection in the one case as in the other. What these means are, in what contingency they may be used, and how they are to be judged of by the defendant, will be considered under the next head.

3. There was evidence, — and the statement of the prisoner made on the trial must, for this purpose, be treated as such, — from which the jury might have found (as supposed in part of the charge given by the court below) that the defendant took the ax from the house for the purpose of self-defense, and stepped out of the door for the purpose of inducing the rioters to leave, or of dispersing them; and that as he stepped out the crowd cried out, "Kill him, damn him, kill him"; and that, rushing towards him, some one or more of them hit him with a gun or club, or other weapon. If this hypothesis should be found to be true, instead of the charge given by the court, the jury should, I think, have been told substantially that the defendant was excusable for acting according to the surrounding circumstances as they appeared to him; and if, from those circumstances, he believed there was imminent danger of death or great bodily harm to himself or any mem-

ber of his family, then, if he had already tried every other reasonable means which would, under the circumstances, naturally occur to an honest and humane man to ward off the danger or repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and if such means resulted in the death of any of the supposed assailants, the homicide would be excusable.

It is not to be forgotten that the rioters assembled there for an illegal object,—for the purpose, by their own confession, of a wanton and unprovoked insult and defiance to the defendant and his family; that the unpleasant, and as it turned out, the terrible, crisis, was forced upon the defendant, against his will, by their criminal conduct. And while provocation as such cannot render the homicide excusable, yet in estimating the nature and imminence of the danger, in the choice of means to avoid it, or the amount of force or kind of weapon to be used in repelling it, the excitement and confusion which would naturally result from the surrounding circumstances—for which the rioters alone were responsible—should not be overlooked. To require of the defendant, while under a high degree of mental excitement, induced by their wrongful and criminal conduct, and without his fault, the same circumspection, and cool, deliberate judgment, in estimating the danger or the choice of means for repelling it, as we, who are unaffected by the excitement or the danger, may now exercise in contemplating it, would be to ignore the laws of our being, and to require a degree of perfection to which human nature has not yet attained. Of the weight a jury should give to these considerations, no safer standard can be found than their own individual consciousness, and the consideration of what they, with the honest purpose of avoiding the danger, without unnecessarily taking life, might, under the circumstances in which the defendant was placed, be likely to do.

As no fault was found with the charge in reference to the distinction between murder in the first and second degree, or between murder and manslaughter, it is unnecessary to consider the phases of the case which might call for a charge upon those questions.

A new trial must be granted.

It is proper to notice the erroneous practice, which has been resorted to in this case, of bringing up the case upon a writ of error before judgment. There is in such a case no

judgment to reverse, and no appropriate function to be performed by a writ of error. By reference to chapter 197, Compiled Laws, it will be seen that the record and proceedings, including the exceptions, should have been certified to this court by the clerk, without a writ of error. But as the certificate of the clerk, by way of the return to this writ, substantially complies with this requisition, this court is equally possessed of the case: See *Shannon v. People*, 5 Mich. 36. No writ of error should have issued in the present case, and no assignment of errors was necessary.

The other justices concurred.

EVIDENCE OF TRANSACTION, AS WHOLE, IS ADMISSIBLE IN PROSECUTIONS FOR HOMICIDE: *Maher v. People*, 81 Am. Dec. 781, 789; *Brown v. People*, 97 Id. 195; *People v. Marble*, 38 Mich. 124, citing the principal case. On the subject of *res gesta*, in general, see *People v. Vernon*, 95 Am. Dec. 49, and extensive note.

DEFENSE OF PERSON OR PROPERTY AS JUSTIFYING HOMICIDE: See *State v. Moore*, 83 Am. Dec. 159; *People v. Batchelder*, 85 Id. 231; *Wise v. State*, 85 Id. 595; *State v. Shippey*, 88 Id. 70; *Floyd v. State*, 91 Id. 760; *State v. Benham*, 92 Id. 417, and the notes thereto; also note to *Barnes v. Martin*, 82 Id. 674. The principal case is referred to in *People v. Lilly*, 38 Mich. 276, 277, on the point that homicide is excusable where one had reason to believe and did believe that it was necessary to take life to save his own, or to protect himself from danger of great bodily harm; and it is cited in *Hurd v. People*, 25 Id. 412, as fully explaining the nature of the circumstances which will render a homicide excusable.

THE PRINCIPAL CASE IS ALSO CITED IN *Geary v. People*, 22 Mich. 223, to the point that where a witness, on cross-examination, denies having made statements which disclose an interest in the result of the trial, it is competent to show that such statements were actually made.

MARTIN v. HAMLIN.

[18 MICHIGAN, 354.]

GRANTEE WHO RELIES UPON RECITAL IN DEED OF NUMBER OF ACRES CONVEYED, AS GUARANTY OF QUANTITY, thereby mistakes the legal effect of the instrument, and cannot obtain any relief upon that ground.

VERBAL AGREEMENT, CONTEMPORANEOUS WITH EXECUTION OF DEED AND NOTES AND MORTGAGE, ON CONSUMMATION OF SALE OF LAND, that if the land, on being surveyed by the grantee, fell short of the quantity which the grantor said he would warrant, a sum proportioned to such deficiency should be indorsed on the mortgage, is merged in the deed and other writings, which must, in the absence of fraud or mistake, be conclusively presumed to contain the whole contract; and besides, such verbal agreement tends to contradict the notes and mortgage given.

BILL in chancery to compel the defendant to make an indorsement on a note and mortgage, on account of payment. The facts are stated in the opinion.

M. E. Crofoot, for the complainant.

A. C. Baldwin, for the defendant.

By Court, CHRISTIANCY, J. The agreement set up in the bill in reference to a guaranty of the quantity of land, a survey of the premises, and an indorsement to be made on the mortgage for any deficiency, was, if any such existed, wholly verbal. Whether such verbal agreement was ever made is a question upon which the evidence is conflicting, and much of it directly contradictory, leaving the question open to considerable doubt. But without going at all into the question of the weight of the evidence, we propose to consider the case in the most favorable aspect to the complainant which the testimony on his own part will warrant.

The case, as presented by the evidence on the part of the complainant, including his own, is substantially this:—

The defendant was residing on the farm at the time of the sale, and had resided there for some twenty-five years. Complainant and his father, who aided him in the negotiation, had also been acquainted with the premises for many years. There is no pretense on the part of complainant that the actual boundaries of the land were not known by and visible to all the parties. But the defendant had never had it surveyed. At the time of the verbal arrangement for the sale, two or three days before the papers were executed, the defendant represented the land as containing 110 acres, and said he would warrant it to contain that quantity; and complainant thereupon verbally agreed to purchase the farm and pay four thousand two hundred dollars for it, if there should be that amount of land. This verbal arrangement was made at the defendant's house on the premises; and the parties were to go in a day or two after to Pontiac, and have the writings drawn. They met at Pontiac, accordingly, for that purpose. Mr. Carhart, a justice of the peace, was employed, at the suggestion of the defendant, to draw the papers,—a deed from defendant to complainant, and notes and a mortgage upon the land for part of the purchase-money, and an assignment by the complainant to the defendant of another mortgage received as part of the purchase-money.

Immediately before the papers were drawn, as the parties were going up into Carhart's office for the purpose, on or at the foot of the stairs, a conversation was had between the parties, in which it was verbally agreed that complainant should or might get the land surveyed by the county surveyor, and if it fell short (of 110 acres), an amount proportioned to such deficiency should be indorsed on the first payment, to be secured by the mortgage complainant was to give for fifteen hundred dollars of the purchase-money. If the land should overrun, complainant was to pay for the excess at the same rate, though it is not stated how or when. The parties then went into the office, and while Carhart was drawing the deed of the farm, the defendant wished him to insert the words "more or less" after the words at the close of the description, "containing 110 acres." But to this, complainant's father, acting on his behalf (though he was himself present), objected; because they did not know, as he says, how much land there was, and they were to have it surveyed, or as stated by the father in his testimony, "because the complainant had nothing but the defendant's word for the amount of land, but expected 110 acres." The verbal agreement was not stated to the justice, or in his presence. The deed was drawn without the words "more or less," and the complainant executed his three promissory notes or five hundred dollars each, and a mortgage upon the farm to the defendant securing the notes, having paid him in cash and by the assignment of a mortgage the balance of the four thousand two hundred dollars. Complainant says he delivered his mortgage and notes, relying upon the understanding above stated. The papers were exchanged. Complainant received the deed, and went into possession. No written agreement was executed or seems to have been contemplated by either of the parties as to the survey or the indorsement of any deficiency.

Upon survey, made some months after by the county surveyor, the farm was found to contain but ninety-three and a half acres; and the defendant, being called upon to indorse the deficiency, refused.

From this statement it is clear,—1. That the verbal agreement, if made as claimed by the complainant, constituted, while the matter remained in parol, a part of the terms of the entire contract of purchase and sale; 2. That the papers drawn by Carhart, and executed by the parties, together

with the payment of a part of the purchase-money, were intended and understood by both parties as the consummation of the sale by the one and the purchase by the other; 8. That the omission to insert in the deed or mortgage, or a separate instrument, any stipulation with reference to a survey to be had of the land, or the allowance or indorsement for deficiency, was not the result of any mistake of fact, or of inadvertence from the subject not occurring to the mind of the complainant, but that the subject of such survey and deficiency was present to his mind during the drawing of the papers, and that the deed was drawn without the words "more or less," with the idea that it would operate as a guaranty of the quantity; that the parties knew the contents of all the papers executed; that all were executed and exchanged without any oversight or mistake of fact, in the very form intended by all the parties; and that they contained all that the parties intended should be contained in any written evidence of the transaction between them.

It is not denied that, upon the face of the papers executed, and according to their legal effect, the complainant took the farm at his own risk as to quantity: *Roat v. Puff*, 3 Barb. 553, and cases there cited. If, in accepting the deed and exchanging papers, he did not intentionally abandon all claim of compensation for deficiency, he must have relied either, — 1. Upon the quantity mentioned in the deed as a guaranty; or 2. Wholly upon the contemporaneous verbal agreement; or 3. Upon both together.

If he relied upon the first, it was a mistake of the legal effect of the instrument, the contents of which he knew, — purely a mistake of the law. This is no ground for relief: See *Irnham v. Child*, 1 Bro. C. C. 92; *Townsend v. Stangroom*, 6 Ves. 328, 332; *Worrall v. Jacob*, 3 Mer. 267, 271; *Hunt v. Rousmaniere*, 1 Pet. 1; S. C., 2 Mason, 366; *Gilbert v. Gilbert*, 9 Barb. 532; *Arthur v. Arthur*, 10 Id. 9; *Farley v. Bryant*, 82 Me. 474; *Mellish v. Robertson*, 25 Vt. 608.

He can have no relief upon the ground of the verbal agreement alone, or in connection with the deed; because, first, to say nothing of the statute of frauds, it was a part of an entire contract for the sale of the land, made immediately preceding, and contemporaneous with the deed and other papers executed in consummation of the sale, and related to its very terms. It was, therefore, merged in or cut off by the deed and other writings by which the sale was consummated, and

which must, in the absence of fraud, be presumed to contain all the terms finally agreed upon: *Street v. Dow*, Harr. (Mich.) 429; *Stevens v. Cooper*, 1 Johns. Ch. 429 [7 Am. Dec. 499]; Stark. Ev. 660-665; 1 Greenl. Ev., sec. 275; Cowen and Hill's Notes to Phill. Ev., note 948; and see especially *Broughton v. Coffey*, 18 Gratt. 184.

2. Because the parol agreement would tend to contradict and vary the notes and mortgage given by complainant at the same time as a part of the same transaction: *Jones v. Phelps*, 5 Mich. 222; *Adair v. Adair*, 5 Id. 204 [71 Am. Dec. 779]; *Stevens v. Cooper*, 1 Johns. Ch. 425 [7 Am. Dec. 499]; *Cook v. Combs*, 39 N. H. 592 [75 Am. Dec. 241]; *Oelricks v. Ford*, 23 How. 49; *Crosier v. Acer*, 7 Paige, 141; *Austin v. Sawyer*, 9 Cow. 39, 49; *Dix v. Otis*, 5 Pick. 38; *Powell v. Edmunds*, 12 East, 6; *Noble v. Bosworth*, 19 Pick. 314; *Conner v. Coffin*, 22 N. H. 542-544; *Gregory v. Hart*, 7 Wis. 532; *Hoyt v. French*, 24 N. H. 199; *Lang v. Johnson*, 24 Id. 302; *Hoxie v. Hodges*, 1 Or. 251; *Underwood v. Simonds*, 12 Met. 278; *Adams v. Wilson*, 12 Id. 138 [45 Am. Dec. 240]; *Richardson v. Comstock*, 21 Ark. 69; *Oskaloosa College v. Stafford*, 14 Iowa, 152; Parsons on Bills and Notes, 501, 503.

And this rule applies as well in equity as at law: *Wesley v. Thomas*, 6 Har. & J. 24; *Chetwood v. Britton*, 2 N. J. Eq. 439; *King v. Baldwin*, 2 Johns. Ch. 557, 558; *Eveleth v. Wilson*, 15 Me. 109; *Richardson v. Thompson*, 1 Humph. 154.

The cases of compensation for deficiency relied upon by complainant's counsel are mainly those arising upon contracts of sale or purchase not yet carried into effect by the execution of the final conveyance and other writings essential to its completion, and where the vendor has filed his bill for the execution of the contract, and the defendant has set up fraud, or mistake in quantity, or the omission in the writing of terms verbally agreed upon, or a parol variation or discharge (as in *Winch v. Winchester*, 1 Ves. & B. 375, and other cases mentioned in Story's Eq. Jur., sec. 170), or, when the bill has been filed by the purchaser for the execution of the contract, for so much as the vendor is able to convey, or for so much as there is of the land (fraudulently represented by the vendor, and believed by the purchaser, to contain more), and for compensation for the deficiency, as in *Hill v. Buckley*, 17 Ves. 895, upon which complainant's counsel relies. Bills for specific performance in such cases, and defenses thereto,

stand upon principles so essentially different from those involved in the present case as to require no comment.

Belknap v. Seeley, 2 Duer, 570, cited by complainant's counsel, was an action in the nature of a bill in equity, brought by the purchaser to rescind a contract for the purchase of land, on the ground of a fraudulent representation of quantity, and sustained on the ground of mutual mistake. One of the express grounds upon which relief was given, as appears by the opinion of Emmett, J., was, that the contract or sale was yet *in fieri*, and therefore strictly within the equitable powers of the court.

It is true, courts have not laid it down as an absolute rule that no relief shall be given for a deficiency when the contract has been carried into effect by a deed. *Marvin v. Bennet*, 26 Wend. 169, was a bill brought for relief on this ground, after conveyance of the land and mortgage given back; and it was held that the bill could only be sustained on the ground of mistake or fraud, neither of which was established in that case, and the relief was denied.

The court recognized the fact that much stronger and clearer evidence is required of the mistake in such cases than when the matter rests in contract of sale, and seem to think the evidence must be such as to remove all doubt; and they hold, in that case, that complainant's attention having been distinctly called to the question of quantity, and of a guaranty upon that subject, and having accepted the deed without such guaranty, and executed the notes and mortgage, he took the chance of a deficiency or excess, and must be held virtually to have abandoned any claim for deficiency.

In the case now before us, no fraud is imputed to the defendant. The parties dealt with each other upon equal terms. There was no mistake in the execution of the papers intended to be executed. And by accepting the deed, executing the notes and mortgage, and going into possession under the deed, with full knowledge of the contents of all the papers, and the question of deficiency present to his mind, and without asking for any written evidence of the supposed parol understanding, we think the whole contract must be conclusively presumed to be embraced in the papers executed: See *Howes v. Barker*, 3 Johns. 506 [3 Am. Dec. 526]; *Schemerhorn v. Vanderheyden*, 1 Id. 140; *Houghtaling v. Lewis*, 10 Id. 297; *Mumford v. McPherson*, 1 Id. 413 [3 Am. Dec. 839]; *Broughton v. Coffey*, 18 Gratt. 184. We think the alleged verbal

agreement in this case stands upon no better ground than would a parol reservation of growing crops on the land conveyed.

The decree of the court below must be reversed, with costs, and the bill dismissed.

The other justices concurred.

MISTAKE OF LAW WILL NOT BE RELIEVED AGAINST, in the absence of special circumstances: *Dill v. Shahan*, 60 Am. Dec. 540, and note; *Goodenow v. Ewer*, 76 Id. 540; *Boggs v. Fowler*, 76 Id. 561; *Jordan v. Stevens*, 81 Id. 556; *Freeman v. Curtis*, 81 Id. 564; *Kenyon v. Welty*, 81 Id. 137; *Burt v. Wilson*, 87 Id. 142; *McIndoe v. Hazelton*, 88 Id. 701; *Hawratty v. Warren*, 90 Id. 613; *Emerson v. Navarro*, 98 Id. 534.

WRITTEN CONTRACT CANNOT BE CONTROLLED BY CONTEMPORANEOUS VERBAL AGREEMENT: *Timms v. Shannon*, 81 Am. Dec. 632, and note. Where, from the nature of an instrument and what it contains, the whole contract must be presumed to have been reduced to writing, parol evidence cannot be given, in the absence of fraud, of what was said, or of any oral agreement made previously or at the same time, which would have the effect to contradict, add to, or vary the written contract: *Buchtel v. Mason Lumber Co.*, 1 Flipp. 645. So evidence of a verbal agreement made at the time of indorsing a note is not admissible for the purpose of changing the legal import of the indorsement: *Ortmann v. Canadian Bank of Commerce*, 39 Mich. 519. The principal case is cited to the foregoing propositions. Compare the point to which it is cited in *Reynolds v. Campbell*, 45 Id. 532.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

MARTIN AND WIFE v. PARKER AND WIFE.

[14 MINNESOTA, 12.]

IN ACTION FOR PARTITION OF REAL PROPERTY, SUMMONS ADDRESSED "TO THE ABOVE-NAMED DEFENDANTS" is a sufficient compliance with the requirements of the Minnesota statute, where the names of the defendants are stated in the title of the case in the summons, and the complaint alleges that the defendants named are the only persons, except the plaintiffs, having or claiming any interest in the property.

APPEAL from an order denying a motion to set aside the summons. The opinion states the case.

Atwater and Flandrau, for the appellants.

J. B. Gilfillan, for the respondents.

By Court, **WILSON, C. J.** This is an action for the partition of real property, under chapter 74 of the General Statutes. The summons is addressed "to the above-named defendants"; the names of the defendants being before stated in the title of the case. The complaint alleges:—

"That the said plaintiff John Martin and the said defendant Benjamin Parker own, possess, and are seised in fee-simple as tenants in common of the following-described land, real estate, and premises. . . . That the said plaintiff Jane B. Martin is the wife of said plaintiff John Martin, and as such has and claims an inchoate right of dower in and to the undivided half-interest of the said plaintiff John Martin in said premises; that the said defendant Hannah Parker is the wife of the said defendant Benjamin Parker, and as such

has and claims an inchoate right of dower in and to the said undivided half-interest of the said defendant Benjamin Parker in said premises. The said property is of the cash value of five thousand (\$5,000) dollars; that the above named are the only persons having or claiming any interest in or to said premises, or any part thereof." The counsel for the defendants moved the court for an order setting aside the summons, on the ground that it "is not addressed by name to all the owners and lien-holders who are known, and generally to all persons unknown, having or claiming an interest in the property described in the complaint herein."

The court denied the motion, and the defendants appealed. Sections 2 and 3 of the chapter under which the action is brought provide:—

"Sec. 2. The summons shall be addressed by name to all the owners and lien-holders who are known, and generally to all persons unknown, having or claiming an interest in the property.

"Sec. 3. The interest of all persons in the property, whether by the way of ownership or lien, and whether such persons are known or unknown, shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if any one or more of the parties, or the share or quantity of interest of any of the parties, is unknown to the plaintiff, or uncertain or contingent, or the ownership of the inheritance depends upon executory device, or the remainder is a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint. The complaint shall also contain an allegation of the cash value of the property, and shall be verified."

This summons is addressed to the defendants by name. We do not understand them in this respect to question its sufficiency, or to claim that their names should have been repeated; that clearly was unnecessary.

We need only consider, therefore, whether it should have been addressed "generally to all persons unknown, having or claiming an interest in the property." By section 3 it appears that the interest or liens of all persons, known or unknown, in or on the property, are to be set forth as particularly as may be, and determined by the judgment, and that when any of the parties are unknown, that fact must be alleged; when known, their names must be given. Section 2 requires the summons to be addressed to the claimants known particularly

by name; to those unknown, generally; but it only requires it to be addressed to those having or claiming an interest in the property. In this case, it appearing that the defendants are the only persons, except the plaintiffs, having or claiming an interest in the property, it was only necessary to address the summons to them.

Order affirmed.

WHITE v. PHELPS.

[14 MINNESOTA, 27.]

PLEDGEES MAY MAINTAIN ACTION IN HIS OWN NAME UPON PROMISSORY NOTE payable to order, transferred, after its maturity without indorsement by the payee, as collateral security for the payment of a debt due on a certain day, where the pledgor has made default in the payment of the debt which it was pledged to secure. And no demand by the pledgee is necessary, in such case, to enable him to sue.

ACTION on a note. The plaintiff alleged that one Benjamin Phelps executed to him his promissory note, and transferred and delivered to him a certain promissory note of the defendant, then past due, as collateral security for its payment; that the said note of Benjamin Phelps was due and unpaid. He demanded judgment against the defendant for the amount due on the note so pledged. The court below sustained a demurrer to the complaint, and the plaintiff appealed.

P. De Rochebrune, for the appellant.

C. K. Davis, for the respondent.

By Court, McMILLAN, J. The principal question presented by the demurrer to the complaint in this action is, whether the transfer and delivery of a promissory note, after maturity, and without indorsement, as collateral security for the payment of a debt, enables the pledgee, upon default of the pledgor, to maintain an action on the note in his own name against the maker. The transaction is in the nature of a pledge, and the rights and liabilities of the parties must be determined by the law applicable to pledges of personal property of this character. It is a well-settled rule of law relating to this class of bailments that the general property in the pawn remains in the pledgor, and a special property therein passes to the pledgee.

There is no rule of law which limits or defines absolutely

the special property of a pledgee, but the rights and liabilities of the latter are to be determined from the terms, express or implied, of the contract between the parties, and we apprehend that whatever special interest or estate in the pawn is necessary to enable the pledgee to exercise the rights guaranteed to him, or discharge the obligations imposed on him by the contract, will vest in him.

Let us consider, then, so far as it is necessary, what are the rights and liabilities of the parties in this case.

Where goods are deposited to secure a loan, "it may be inferred," says Gibbs, C. J., "that the contract was this: If I (the borrower) repay the money, you must redeliver the goods; but if I fail to repay it, you may use the security to repay yourself": *Pothonier v. Dawson*, 1 Holt N. P. 383; 3 Eng. Com. L. 154.

The primary, and indeed the only, purpose of the pledge is, to put it into the power of the pledgee to reimburse himself for the money advanced when it becomes due and remains unpaid.

The contract carries with it an implication that the security shall be made effectual to discharge the obligation: *Wheeler v. Newbould*, 16 N. Y. 396. When the pledge is given as collateral security for the payment of a debt, it can be made effectual to pay the debt only by being converted into money; and in the absence of any special agreement to the contrary, and where there is nothing in the nature of the pawn inconsistent with such intention in the parties, the pawnee may proceed to sell the property, without judicial process, upon giving reasonable notice to the debtor to redeem.

The means generally resorted to for the accomplishment of the purpose of the pledge is a sale of the property pledged, and writers upon the subject generally state this as the power conferred upon the creditor to satisfy his debt: Story's Eq. Jur., sec. 1008; 2 Kent's Com. 582.

But there is nothing in the nature of this bailment which absolutely requires a sale in all cases; and if the subject of the pledge is such that, from its nature, it is to be inferred with reasonable certainty that the parties intended to restrict the pawnee in the exercise of his powers to a proceeding in chancery, he will not be permitted to sell without a decree: *Clark v. Gilbert*, 2 Bing. N. C. 356, explained; Smith's Lead. Cas. 298, 299. Or if, from its nature, the pawn cannot be converted into cash without injury to both or one of the parties, and may

be converted into money by some other method more beneficial to the parties, we think the pledgee is permitted, and in equity, if not at law, required, to pursue the latter course; for the bailment is for the mutual benefit of both parties, and is in the nature of a trust. "The creditor," says Kent, is required "at his peril to deal fairly and justly with the pledge. . . . The law, especially in the equity courts, is vigilant and jealous in its circumspection of the conduct of trustees": 2 Kent's Com. 583.

In the case under consideration, there is nothing in the contract expressly restricting the power of the pledgee in the disposition of the pledge. Is there anything in the nature of the pledge from which it is reasonably to be inferred that the parties intend to prohibit a sale of the pledge, either with or without judicial process? or to afford any remedy concurrently with a sale? or to restrict the pledgee in any event in pursuing his remedy to a proceeding in chancery?

The pawn in this case is an unindorsed negotiable note. There are no facts or circumstances going to show that the amount of the note, so far as the maker is concerned, cannot be fully realized in a suit at law. Under these circumstances, we think, the pawnee is not permitted to dispose of the note by sale.

The reasoning of Brown, J., on the same question, in *Wheeler v. Newbould*, *supra*, fully sustains this conclusion. Is there anything in the nature of the pawn in this case which would reasonably indicate an intention to restrict the pledgee to a proceeding in chancery, in realizing his debt from the property pledged? If there is not, the party has an election to pursue his remedy either at law or in equity. The rights and remedies of parties to promissory notes are generally within the exclusive jurisdiction of the courts of law. If in this case the pledgee has not a remedy by action at law, and we are right in the view we have taken of the power of sale, it is only because the note is not indorsed by the payee. Does this deprive him of his right of action at law? It is doubtless true that, by the law merchant, if a promissory note is originally payable to a person, or his order, it is properly transferable by indorsement, and that the indorsement of the payee is necessary to pass the legal title to a third person, so that at law, in the absence of statutory provision to the contrary, he can maintain an action on the note in his own name. But by a transfer without an indorsement, the holder will acquire the

same rights that he would acquire upon a transfer of a note not negotiable,—that is, he may at law sue the other parties thereto in the name of the payee or assignor: Story on Promissory Notes, sec. 120, note 3; Story on Bills, sec. 201, note 3; *Jones v. Witter*, 13 Mass. 304–306. Does the pledge of a note unindorsed operate as an assignment of it? It is to be observed that the contract of pledge exists in law as well as equity, and that by operation of law the pledgee takes, not a lien only, which is merely a right to retain until the debt, in respect of which the lien was created, has been satisfied, but a property,—an ownership in the property pledged: Story on Bailments, sec. 93, g, h, c. It is a special ownership,—that is, it is special from the fact that it is limited in its character; it is an ownership limited to the purposes of the pledge; but as to these purposes the property in the pawn is vested in the pledgee, and the rights of the pledgee to the same extent are paramount to those of the pledgor.

The purpose of the pledge is, as we have seen, that the pledgee may reimburse himself for his debt when it becomes due and remains unpaid. This can only be done by converting the pledge into money. This, then, he has a right to do in a *bona fide* manner, and the contract assigns him such a property in the pledge as will enable him to do it. Whether it is a note or goods and chattels makes no difference,—the property passes; but in the case of a negotiable note, the pledgee, in any action in a court of law which requires a legal title to the property in the plaintiff, must proceed in the name of the payee of the note, unless there is statutory provision to the contrary.

Assuming that we are right thus far, we think our statute has so changed the law as to permit the pledgee, after default of the pledgor, to maintain an action in his own name. The statute reads as follows: "Every action shall be prosecuted in the name of the real party in interest, except as hereinafter provided; but this section does not authorize the assignment of a thing in action not arising out of contract": Gen. Stats., c. 66, tit. 3, sec. 26, p. 453. In considering this section with reference to the right of action upon a note unindorsed, Flandrau, J., says: "The only question under our practice is, In whom is the real, substantial ownership and property of the note? In whomsoever that is found, there the cause of action is also": *Pease v. Rush*, 2 Minn. 111.

As the plaintiff by the pledge acquired a substantial owner-

ship and property in the note, an action brought for the purpose of enforcing a right incident to that property or ownership must, under our statute, be brought in his own name. It is true the pledgor also retains a property in the pledge, but it is entirely distinct and separate from that of the pledgee, and their interests are, perhaps, adverse. It is neither necessary nor proper, therefore, that they be joined as plaintiffs in this action.

The debt, to secure which the pledge was given, was payable at a specific time. When the debt, to secure which the pledge was given, is payable at a time certain, and the pawn is a promissory note, no demand by the pledgee is necessary before bringing a suit upon the note pledged: Story on Bailments, sec. 308; 2 Parsons on Contracts, 120.

Whether the pledgor should not be made a party defendant in this action is a question not presented by the demurrer, and one upon which we express no opinion.

Order sustaining demurrer overruled.

RIGHT AND DUTY OF PLEDGEE TO COLLECT COLLATERAL SECURITY: See *Rowe v. Haines*, 77 Am. Dec. 101, note 103; note to *Robinson v. Hurley*, 79 Id. 503; *Pickens v. Yarborough*, 62 Id. 728; *Miller v. Gettysburg Bank*, 34 Id. 449, note 451. Where a pledgee has received, as collateral security, a debt, he may receive payment thereof, and may sue for and collect it: *Goldsmidt v. First Methodist Church*, 25 Minn. 205, citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Cassidy v. First Nat. Bank of Faribault*, 30 Minn. 88, to the point that a party acquiring title to a negotiable instrument by delivery, without indorsement, is the real party in interest, and entitled, under the Minnesota practice, to maintain an action upon it in his own name.

FIRST NATIONAL BANK OF ST. PAUL v. COUNTY COMMISSIONERS OF SCOTT COUNTY.

[14 MINNESOTA, 77.]

BONDS HAVING ATTACHED COUPONS, FOR SEVERAL YEARS OVERDUE AND UNPAID, are dishonored on their face, and a purchaser thereof takes them subject to all equities. The interest on such bonds, equally with the principal, is a part of the debt which they were intended to evidence, and it is not material whether the whole or only a part of the debt was overdue.

NEGOTIABLE INSTRUMENT PAYABLE AT TIME CERTAIN IS OVERDUE as soon as that time has passed, whether payable generally or at a specified place, and one who takes it after it is due gets no better title than the party had from whom he received it.

APPEAL from a judgment entered upon the report of a referee. The facts are stated in the opinion.

John H. Brown, for the appellants.

Bigelow and Clark, for the respondent.

By Court, WILSON, C. J. This suit was brought on certain bonds of Scott County. The act under which they were issued authorized the board of county commissioners of that county "to issue bonds. . . . Said bonds shall bear interest at a rate not exceeding seven per cent per annum, and shall be made payable at any time not less than five years from the date thereof, . . . and the county auditor of said county may, when authorized by said board of commissioners, draw warrants on the county treasurer for the amount of interest due on said bonds": Special Laws 1861, 280, 281.

The referee has found, as a matter of fact, that by the bonds issued under this law, and on which the plaintiff has brought this action, "the said county of Scott obligated itself, for value received, to pay one Justis H. Sweet, or the holder thereof, the sum of —, at the treasurer's office, in the said county of Scott, on the first day of April, 1866, with interest thereon at the rate of seven per cent per annum, payable annually, on the presentation of the corresponding interest warrants."

The particular form of the bonds or coupons is not given. The bonds in suit were lost by or stolen from the owner, and subsequently, in July, 1865, purchased by the plaintiff in good faith, at their market value, with all the coupons attached thereto.

The plaintiff's right to recover is disputed on several grounds, but one of which we consider. It appears from the enabling act, and the facts found by the referee, that the contract for the payment of interest is in the bond. The coupon is evidence of a sum due on the bond for interest, and it is attached as a matter of convenience merely. It serves as a warrant to the holder to receive the sum due, and a voucher when the money is paid. In other words, it is a mere token ticket or interest warrant indicating the time and place when and where certain sums would be due and payable for interest on the bond: *Arents v. Commonwealth*, 18 Gratt. 750, 771, 772.

The fact that it appeared upon the face of the bonds that the interest for several years was overdue and unpaid was,

we think, a circumstance of suspicion sufficient to put the plaintiff on its guard. The bonds were thus dishonored on their face. The interest, equally with the principal, is a part of the debt which they were intended to secure, and it does not seem to us material whether the whole or only a part of that debt was overdue. When due, the plaintiff had a right of action for the recovery of the interest as for any other installment due on the bond. It is argued that the interest was only payable on the presentation of the coupons to the county treasurer, and presentation not having been made before the plaintiff purchased, that the bonds are not affected by the infirmity of the grantor's title.

This, we think, is not the law. The bonds were payable at the treasurer's office of said county, and of course the holder would have no right to demand the sum due on them without their presentation to the treasurer. They therefore stand in this respect on the same footing with the coupons, and by a parity of reason the plaintiff might claim, had it purchased them after the first day of April, 1866 (the day on which by the terms they were to be paid), that they were not overdue, and that it was not subject to any equities or infirmity of title affecting its grantor.

But the law is, that a negotiable instrument, payable at a time certain, is overdue as soon as that time has passed, whether payable generally or at a specified place, and the person who takes it by indorsement or delivery after it is due gets no better title than the party had from whom he received it. The fact that the day of payment has passed before the transfer is of itself a ground of suspicion, and sufficient to affect the title of the transferee. This is said to be a rule of law founded on grounds of policy, and designed to prevent fraud: See *Arents v. Commonwealth*, *supra*, and cases there cited; *Newell v. Gregg*, 51 Barb. 263.

Judgment reversed.

NEGOTIABLE INSTRUMENT ON WHICH INTEREST IS PART DUE, WHETHER TO BE REGARDED AS DISHONORED, AND SUBJECT TO DEFENSES IN HANDS OF BONA FIDE HOLDER. — The only cases we have been able to find that agree with the decision in the principal case upon this question are *Hart v. Sickney*, 41 Wis. 630, S. C., 22 Am. Rep. 728, and *Newell v. Gregg*, 51 Barb. 263. In the former of these cases, it was held that a promissory note bearing interest payable annually, which was indorsed before maturity, but after an installment of interest was due and unpaid, was dishonored, and that the indorsee took it subject to all equities between the original parties. This decision is, however, in direct conflict with that in the prior case of *Boss v.*

Hewitt, 15 Wis. 260, and has been overruled by the subsequent case of *Kelley v. Whitney*, 45 Id. 110. In the last-named case, Cole, J., who delivered the opinion, said that the court in deciding *Hart v. Stickney*, *supra*, entirely overlooked the case of *Boss v. Hewitt*, *supra*, and counsel had not called the court's attention to it. In the case of *Parsons v. Jackson*, 99 U. S. 434, 440, Mr. Justice Bradley, who delivered the opinion of the court, gave expression to the following dictum: "The presence of the past-due and unpaid coupons was itself an evidence of dishonor sufficient to put the purchasers on inquiry." But Mr. Justice Woods, in delivering the opinion of the court in the subsequent case of *Railway Co. v. Sprague*, 103 Id. 762, referring to this dictum of Mr. Justice Bradley, said: "But the case did not turn on this circumstance alone. There were other significant indications of the invalidity of the bonds, and the opinion must be restricted to the case before the court." It seems, therefore, that the principal case and the case of *Newell v. Gregg*, 51 Barb. 263, now stand alone in holding that a negotiable instrument is dishonored when an installment of interest is due and unpaid. The points decided in *Newell v. Gregg*, *supra*, were, that where a note is for the payment of money at a specified time, with interest payable annually, the payment of interest annually is as much a part of the agreement as the promise to pay the principal; it is a portion of the debt, and if, when the note is sold to a third person by the payee, a year's interest is past due, the note is then dishonored. When an instrument furnishes evidence that the promise to pay is broken, a party taking it takes it with a warning that the maker may have some defense.

But whatever doubt or vacillation there may have heretofore been on this question, it is now well settled by the great weight of authority that the mere fact that an installment of interest on a negotiable instrument is overdue and unpaid, disconnected from other facts, is not sufficient to affect it with dishonor, and subject it to defenses in the hands of a *bona fide* holder: 2 Daniel on Negotiable Instruments, 3d ed., sec. 1506 a; *Cromwell v. County of Sac*, 96 U. S. 51; *Railway Co. v. Sprague*, 103 Id. 756; *Gilbough v. Norfolk & P. R. R. Co.*, 1 Hughes, 410; *Preble v. Board of Supervisors*, 8 Biss. 358; *State v. Cobb*, 64 Ala. 127, 158; *National Bank of North America v. Kirby*, 108 Mass. 497; *Boss v. Hewitt*, 15 Wis. 260; *Kelley v. Whitney*, 45 Id. 110; S. C., 30 Am. Rep. 697; *Brooks v. Mitchell*, 9 Mees. & W. 15.

Paine, J., delivering the opinion of the court in *Boss v. Hewitt*, 15 Wis. 262, said: "Neither do we think that the fact that the interest had not been paid makes the case equivalent to a purchase after maturity, so as to let in defenses that might have been made against the original parties. The interest is a mere incident to the debt; and although it is frequently provided that it shall be paid at stated periods before the principal falls due, we know of no authorities holding that a failure to pay it dishonors the note, so as to let in all defenses against subsequent purchasers for value, without any other notice of defects, except the mere fact that such interest had not been paid. And we do not think it should have that effect. The maturity of the note, within the meaning of the commercial rule upon this subject, is the time when the principal becomes due." Colt, J., who delivered the opinion of the court in *National Bank of North America v. Kirby*, 108 Mass. 501, in discussing this subject, said: "If, as it is argued, it be true that the failure to pay interest ever, as matter of law, amounts to a dishonor of a note, it can only affect one who has knowledge of the fact. Payment of interest is not always indorsed, and other evidence is often relied on to prove it. Want of indorsement does not apprise the party to whom such note is transferred that there has been no payment; and when the note is only taken as collateral, and accuracy is

not required in ascertaining the amount due for interest, the fact that overdue interest is not indorsed might have slight influence in putting the purchaser upon his inquiry. It has, indeed, been held by this court that a note, the principal of which is payable by installments, is overdue when the first installment is overdue and unpaid, and is thereby subject to all equities between the original parties: *Vinton v. King*, 4 Allen, 562. Such a note is a single contract, and the party to whom it is transferred must take it with notice that, as to the overdue installment, the maker may have a justifiable cause for withholding payment, which may affect the whole contract. But in its effect upon the credit of a note, it is manifest that a failure to pay interest is not to be ranked with a failure to pay principal. Interest is an incident of the debt, and differs from it in many respects. It is not subject to protest and notice to indorsers, or days of grace, according to the law merchant. Interest is not recovered on overdue interest; and the statute of limitations does not run against it until the principal is due. . . . We are referred to no case in which it has been held that failure to pay interest, standing alone, is to be regarded sufficient in law to throw such discredit upon the principal security upon which it is due as to subject the holder to the full extent of the security to antecedent equities. There is a large class of negotiable securities the principal of which is payable only at the end of many years, but with interest payable either annually or semi-annually; and many of the notes given in the purchase of real estate, and secured by mortgage, especially in the country, are of this class, as are most of the obligations for debts contracted by public, and many of those incurred by private, corporations; and it is important that the value due to their negotiable character should not be impaired by new rules tending to lessen their currency and credit."

Mr. Justice Field, in delivering the opinion of the court in *Cromwell v. County of Sac*, 96 U. S. 58, said: "The simple fact that an installment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value as a *bona fide* purchaser. To hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every installment of interest on them as it matured; and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures renders them, though they may have years to run, and all subsequent coupons, dishonored paper, subject to all defenses good against the original holders, would greatly impair the currency and credit of such securities, and correspondingly diminish their value."

And Mr. Justice Wood, delivering the opinion of the court in *Railway Co. v. Sprague*, 103 U. S. 761, said: "The contest, therefore, is reduced to this: Did the mere presence upon the bonds purchased by Mrs. Sprague of two past-due, unpaid interest coupons, make the bond dishonored paper? Coupons are separable obligations for the interest payable upon demand. It constantly occurs that they are not demanded for weeks and months, and sometimes years, after they are due. As they bear interest after maturity, it will frequently happen that the owner of a bond who holds it as an investment will keep the coupon for the same purpose. Bonds executed by a

railroad company may not be put upon the market until one or more coupons have matured. The company may cut them off when it sells the bonds, or leave them on to be accounted for in the purchase. Negotiable bonds have been used as a means of raising money, not only by railroad companies, but by the national government, states, counties, and cities. To hold that the moment an unpaid coupon is left on a bond its character and negotiability are changed, would greatly embarrass the traffic in such securities, and lead to endless uncertainty and confusion. The mere presence, therefore, of two unpaid coupons upon the bonds purchased by Mrs. Sprague was not of itself sufficient evidence of the dishonor of the bonds to which they were attached."

The reasoning of the eminent jurists in the opinions from which the foregoing extracts are taken shows that the rule is founded upon sound reason and good policy.

While, as has been shown, the mere fact that interest on a negotiable instrument is overdue and unpaid is not in itself sufficient to dishonor it and let in defenses, yet such fact is a circumstance which may be taken into account by the jury in determining whether or not the holder took it in good faith and without notice of such defenses: *National Bank of North America v. Kirby*, 108 Mass. 497.

And where it is provided in bonds themselves that if default be made as to any coupon, the bonds shall be due and payable, they become so on default of payment of any coupon: 2 Daniel on Negotiable Instruments, 3d ed., sec. 1506 a; *Mayor etc. of Griffin v. City Bank*, 58 Ga. 584. A purchaser, in good faith, of bonds that have been stolen acquires a good title to the bonds and to the coupons not yet due; but as to the coupons overdue and unpaid, he acquires no title as against the true owner: *Gilbough v. Norfolk & P. R. R. Co.*, 1 Hughes, 410; *Arents v. Commonwealth*, 18 Gratt. 750.

GRIGGS v. FLECKENSTEIN.

[14 MINNESOTA, 81.]

RUNNING AWAY OF TEAM IS EFFICIENT CAUSE OF INJURY, if it put in operation the force which was the immediate and direct cause of the injury. And where a team, negligently left unhitched in the principal business street of a town, runs away, and after an attempt on the part of people in the street to stop it, runs into another team properly hitched at the side of the street, and the latter team runs away, and collides with and injures a horse standing on the side of the street, the injury is the natural and proximate result of the negligent act of the owner of the first-mentioned team.

PLAINTIFF CANNOT RECOVER FOR INJURY TO PROPERTY IF HIS OWN NEGLIGENCE CONTRIBUTED thereto, or if, by the exercise of ordinary care, he could have avoided such injury.

LEAVING HORSE UNHITCHED IN STREET IS NOT IN ITSELF NEGLIGENCE. Whether it is negligence or not will depend upon the circumstances of the case, and is a question to be determined by the jury from the facts. And in determining that question, testimony that the horse was trustworthy to stand unhitched in the street is properly admissible.

ACTION for injury to plaintiff's horse and sleigh. The opinion states the case. The following are the requests submitted

by the plaintiff referred to in the opinion: "1. That the right of the plaintiff to recover in this action is not affected by the action of the crowd in trying to stop the defendant's team, whether said crowd did, or did not, by their action, cause the team to swerve from the course it otherwise would have taken; 2. That if the jury should find that the action of the crowd swayed the horses of the defendant from the course they would have taken but for said action, and that the collisions would not have taken place, or the damage been done, had the crowd not interfered, yet the defendant is equally responsible as if no such interference had occurred." The requests submitted by the defendant, referred to in the opinion, are as follows: "1. If they find from the evidence that if the defendant's horses became frightened while standing in the public street, even if negligently left unhitched by the defendant, and ran down the street, and that one or more persons rushed into the street, and strove, by hallooing, swinging of hats, and other noise, to stop them, and the defendant's team shied off to the side of the street, and ran into the team of Matthews, thereby frightening them, and causing them to run away, the defendant is not responsible for any injury caused by said last-named team, unless the jury are able to say that even if said swinging of hands, hallooing, or other demonstrations of by-standers, had not occurred, the injury to plaintiff's horse would not have taken place." The court gave this proposition, with the following oral explanation and modification: "That if the acts of the crowd caused the injury by driving the team from the course which they would otherwise have taken, and upon the team of Matthews, the defendant is not responsible, even if he negligently left his horses unhitched, because there must be not only negligence, but injury resulting therefrom, to render the defendant liable; but unless they were entirely satisfied from the evidence that the defendant's team would not have run upon the team of Matthews if it had not been swayed from its course by the crowd, they must find for the defendant; 3. That if they shall find from the evidence that the defendant's team was negligently left unhitched by the defendant in the public street, and becoming frightened, ran away, and while running down the center of the street were, by shouts and swinging of hands or hats, or other noises, by third parties, swerved from their course to the side of the street where the team which did the immediate injury was standing, thus frightening them, and causing them to run

against the plaintiff's horse, which, without such acts of third parties, the defendant's team would not have done, the defendant is not responsible." The judge also charged the jury that the leaving of the plaintiff's horse in the street unhitched was an act of negligence which, if it contributed to the injury, would debar the owner from recovering, but which would not affect the right of the owner to recover, if the jury believe that the injury would have occurred, even if the horse had been properly hitched. There was a verdict and judgment for the defendant, and the plaintiff appealed.

Perkins and Mott, for the appellant.

G. E. Cole, for the respondent.

By Court, McMILLAN, J. The plaintiff brings this action to recover damages for the loss of a horse, which was killed under the following circumstances:—

The defendant left his team, consisting of a span of horses and a double sleigh attached thereto, standing in the principal business street of the town of Faribault without being hitched, fastened, held, or in any manner secured. It started and ran violently along the street, and against another team, belonging to one Matthews, likewise consisting of two horses attached to a double sleigh, standing properly hitched at the side of the street, frightening the latter team so that it broke loose and ran with the sleigh attached to it across the street and against a horse and sleigh belonging to the plaintiff, breaking the plaintiff's sleigh, and injuring his horse so that he died in two or three days thereafter.

There is evidence tending to show that before the defendant's horses ran into Matthews's team, and while they were running down the street, a crowd of persons came out into the street and hallooed and raised their hats for the purpose of stopping the horses; that this occasioned the horses to swerve from the course they were taking, and drove them across the street so that they hit Matthews's team.

The plaintiff's horse at the time of the injury was unhitched and at the side of the street. The plaintiff's son, who had driven his father's horse to this place, left him unhitched, and went into a store near by. He testified upon the trial that, while in the store, he heard the first runaway team (defendant's) as it passed, and went out on the sidewalk, and was on the sidewalk, about eight feet from his horse, when it was injured.

Then he saw a pair of horses with a sleigh running down the street. They started his father's horse, which was standing near the sidewalk in the street, a few feet from the place he had left him; that he spoke to the horse, and he stopped, and immediately the pole of the other double sleigh struck his horse. There is testimony on the part of the defendant tending to show that when the first runaway team passed it started the plaintiff's horse; that he turned and moved towards the street; and that if plaintiff's horse had not stirred, the second team would have passed without hitting him.

Upon the trial of the cause, the plaintiff being upon the stand as a witness on his own behalf, the plaintiff's counsel asked the witness the following question: "Was the horse trustworthy to stand unhitched in the street?" Objected to by defendant's counsel, on the ground that it was immaterial. The objection was sustained by the court, and the question excluded, to which the plaintiff excepted.

Several exceptions were taken by the plaintiff to the refusal of the court to charge in accordance with requests submitted by him, and to the charge of the court in accordance with requests submitted by the defendant, which we need not consider in detail.

The case involves, substantially, three points,—1. The effect upon the rights of the parties to this action of the conduct of the persons or crowd in hallooing and waving their hats in front of the runaway team of defendant in order to stop it; 2. The effect upon the plaintiff's right to recover, of the fact that the horse had been left unhitched in the street; 3. The admissibility of the evidence sought to be elicited by the question put to the plaintiff as a witness.

The rule of law is well settled that where the plaintiff has been injured in his person or property by the wrongful act or omission of the defendant, or through his culpable negligence, the fact that a third party, by his wrong or negligence, contributed to the injury, does not relieve the defendant from liability: *McMahon v. Davidson*, 12 Minn. 372, 373.

There is no controversy about the fact that the running away of the defendant's team was attributable to and occurred at first through the negligence of the defendant. The team had not stopped, or been at all restrained in their flight, at the time of the appearance of the persons or crowd in the street. The attempt to stop the team was not successful, but, as we have seen, may have swerved the horses from the direct course

in which they were going, and occasioned the collision with the Matthews team hitched at the side of the street. The attempt to stop the team in their course through the street was certainly proper, and would ordinarily be expected. Under such circumstances, there is nothing in the testimony which tends to show that there was anything wrongful, careless, or improper in the means resorted to by these persons to accomplish this purpose; they are therefore entirely innocent and free from blame. If they contributed to the injury in any degree, they were innocent agents in the matter, and as their interference in this manner was proper, and was such an interference as would be embraced in the ordinary results of such an occurrence as this runaway, it would in no wise excuse the defendant, or relieve him from the injury resulting from the runaway which occurred through his negligence. The testimony all shows that the defendant's team did not stop from the time it started to run away at the post-office, until after it came in collision with and started the Matthews team; that the interposition of the crowd or persons in the street was for the purpose of stopping the runaway team, and before its collision; nor is there any evidence to show that the team would have stopped if the crowd had not interposed.

It is evident, therefore, that the running away, from the starting of defendant's team till the collision, was a single occurrence, and whatever influence the interposition of the crowd had in occasioning the collision, it was not the sole cause of it; that the running away which occurred through the defendant's negligence was, in part at least, the occasion of it. Both causes, therefore, in the most favorable view for the defendant, must have contributed to it; and as the defendant is responsible through his negligence for one of the agencies through which the injury occurred, under the rule we have stated, he is liable, although without the agency of both causes the accident would not have transpired. Matthews's team, it appears, was hitched to a post in front of McQuery's store, and there is nothing tending to show any negligence or carelessness on the part of the owner of the team.

The immediate cause of the starting of Matthews's team was the collision of the defendant's team with it, and the injury of the plaintiff's horse was caused directly by Matthews's team striking it. This brings the case within the rule that the injury must be the natural and proximate result of the act complained of. The collision with Matthews's team was the

natural, but not necessary, consequence of the running away of defendant's team in the street. All the consequences which actually resulted in this case from the running away of defendant's team might, we think, reasonably have been expected to occur by the running away of any team, under similar circumstances, in the principal business street of a town, and the running away of the defendant's team was the efficient cause of the injury to plaintiff's horse, because it put in operation the force which was the immediate and direct cause of the injury: 2 Greenl. Ev., secs. 256, 268, 268 a; 3 Parsons on Contracts, 179, 180.

For these reasons, the first and second requests submitted by the plaintiff, which were refused, should have been given to the jury; and the first request submitted by the defendant, as explained and modified by the court, together with the third request submitted by the defendant, and given in charge to the jury, should have been refused.

It is also a well-settled rule, that, in an action for injury to person or property, the plaintiff cannot recover if he contributed to the injury by his own culpable negligence, or if, by the exercise of ordinary care, he could have avoided the injury: 1 Chit. Pl. 127, and authorities cited.

The question of the plaintiff's negligence in this case was one of fact, to be determined by the jury, under the instructions of the court as to what constitutes negligence: *St. Paul v. Kuby*, 8 Minn. 171; *Johnson v. Winona & St. P. R. Co.*, 11 Id. 307. The degree of care required of the plaintiff, or those in charge of his horse, at the time of the injury, is that which would be exercised by a person of ordinary care and prudence, under like circumstances. It cannot be said that the fact of leaving the horse unhitched is in itself negligence. Whether it is negligence to leave a horse unhitched must depend upon the disposition of the horse,—whether he was under the observation and control of some person all the time, and many other circumstances; and is a question to be determined by the jury from the facts of each case: *Lynch v. Nurdin*, 1 Q. B. 29; 1 Hilliard on Torts, 154; *Park v. O'Brien*, 23 Conn. 339.

It was therefore proper for the plaintiff to show, by his testimony, that his horse was trustworthy to stand unhitched in the street, and the question put to the witness for that purpose should have been permitted. It was also erroneous to

charge the jury that "the leaving of the plaintiff's horse in the street unhitched was an act of negligence."

For the reasons stated, the judgment below is reversed, and the verdict of the jury set aside, and a new trial granted.

CONTRIBUTORY NEGLIGENCE AS BAR TO RECOVERY: See *Northern Central R'y Co. v. State*, 96 Am. Dec. 545, note 553, where other cases are collected; *Gaynor v. Old Colony etc. R. R. Co.*, 97 Id. 96; *Carroll v. Minnesota Valley R. R. Co.*, 97 Id. 221.

DAMAGES WHICH ARE NATURAL AND PROXIMATE CONSEQUENCE OF INJURY ARE RECOVERABLE: See *Gregory v. Brooks*, 95 Am. Dec. 278, note 283; *Peshine v. Shepperson*, 94 Id. 468, note 477; *McDonald v. Snelling*, 92 Id. 768, note 776, where other cases are collected. An injury is not too remote to justify a recovery, when it is a result that may reasonably have been anticipated: *Johnson v. Chicago etc. R'y Co.*, 31 Minn. 61; *Billman v. Indianapolis etc. R. R. Co.*, 76 Ind. 170, both citing the principal case. Whoever does an unlawful act is to be deemed the doer of all that results from it: *Weick v. Lander*, 75 Ill. 98, also citing the principal case.

THE PRINCIPAL CASE IS CITED to these points in the following cases: It is error to instruct the jury that if anything else than the negligence of the defendant contributed to produce the injury, the plaintiff cannot recover: *Sheff v. City of Huntington*, 16 W. Va. 321; whether it is negligence or not to leave a horse in the street unhitched, is, in the absence of a statute, to be left to the jury: *Bott v. Pratt*, 33 Minn. 325; in an action by a railroad passenger for a personal injury, against a defendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, the concurrent negligence of the company cannot be imputed to the plaintiff, so as to charge him with contributing to his own injury: *Transfer Co. v. Kelly*, 36 Ohio St. 92.

TUTTLE v. HOWE.

[14 MINNESOTA, 145.]

EVIDENCE THAT TITLE TO LAND ON WHICH HOUSE WAS BUILT WAS IN MARRIED WOMAN, that she knew where her husband got the brick with which the house was built, and the price of them, and that she furnished what money was paid on account of the brick and the building of the house, tends to show that her husband acted as her agent in the purchase of the brick, and will support a finding of the court that they were sold and delivered to her, and that she agreed to pay for them.

MATERIAL-MAN MAY ENFORCE LIEN AGAINST SEPARATE ESTATE of a feme covert.

LIEN OF MECHANIC OR MATERIAL-MAN MAY BE ASSIGNED, under the Minnesota statute, and the assignee may maintain an action in his own name for its enforcement.

IF TRACT OF LAND UPON WHICH BUILDING, ON WHICH LIEN IS CLAIMED, IS SITUATED CONTAINS MORE THAN ONE ACRE, the claimant may carve out the acre upon which he will claim his lien, without consulting the owner of the tract.

CLAIMANT OF MECHANIC'S LIEN, ANTERIOR AND SUPERIOR TO HOMESTEAD right, may enforce his lien without any reference whatever to such homestead right, and the homestead claimant cannot be permitted to exercise a right of selection of the land which he regards as his homestead, so as to interfere with the enforcement of the lien.

SUIT by assignee of material-man to enforce mechanic's lien.
The opinion states the case.

Jones and Butler, for the appellant.

C. C. Wilson, for the respondent.

By Court, BERRY, J. The court below found that on the 20th of October, 1866, Kate C. Howe held and owned a school-land certificate, and that at that time she, with her husband and co-defendant, Lewis S. Howe, was in the possession of the land described in such certificate, against a part of which the plaintiff seeks to enforce a lien; that E. and E. Whitcomb at said time sold and delivered to Kate C. Howe 24,270 brick, for which she agreed to pay \$194.20; that said brick were used by said Kate to build a house on the land aforesaid, and that said house was built for and occupied as a homestead of said Kate and Lewis; that on or about March 8, 1867, said Whitcombs made an account in writing of said brick, as required by law, and filed the same, duly verified, in the proper office, where it was recorded; that on the twentieth day of June, 1867, said Whitcombs duly sold and assigned to the plaintiff said account and lien; that said Kate is indebted to the plaintiff, by reason of the premises, in the sum of \$127.20, with interest, a part of the account having been paid; that on the twenty-sixth day of February, 1867, said Kate and Lewis sold and assigned to the defendant Heaney said school-land certificate, together with their right, title, and interest in the land aforesaid. As a conclusion of law, it is found that the plaintiff is not entitled to a lien upon the land. On what particular ground the court based its conclusion of law we are not informed, but the respondent claims that the conclusion is right,—1. Because there is no evidence to support the finding that the brick were sold and delivered to Kate C. Howe, and that she agreed to pay for them. Now, notwithstanding there was evidence that, in making the contract with the Whitcombs, Lewis S. Howe, the husband, made no mention of his wife, and that she never expressly directed or authorized the purchase of the brick, there was, on the other hand, evidence that the title to the land on which the house was built was in

her name; that she knew where her husband got the brick, and the price of them; and that she furnished all the money paid on account of the brick and the building of the house, being, at least, nearly fifteen hundred dollars, if not more than that sum. We think this evidence had a strong tendency to show that her husband acted as her agent in the purchase of the brick, and that the finding of the court that they were sold and delivered to her, and that she agreed to pay for them, is not unsupported by the testimony in the case.

The respondent further claims that the land on which the building was situate was a homestead, and therefore, upon the authority of *Cogel v. Mickow*, 11 Minn. 475, not subject to forced sale to satisfy the lien. To this position it is a sufficient answer that there is nothing in the evidence or finding to show that it was a homestead at the time when the lien attached. The fact that it became so after the lien attached could not deprive the lien claimant of his lien. It is further urged by the respondent that "Kate C. Howe, being a married woman, could not make a contract for brick, or create a lien upon the house, under the mechanic's lien law, nor have judgment rendered against her in this case. Her separate property can only be reached by bill in equity to charge her separate estate." In support of this proposition, the counsel for the respondent cites *Pond v. Carpenter*, 12 Minn. 430, and *Carpenter v. Leonard*, 5 Id. 155.

The former case certainly does not sustain the counsel's proposition, if it has any bearing upon it at all. In the latter case, substantially the same point embodied in the counsel's proposition was made and overruled. It is there held "that where the law would give a lien for improvements made upon the real estate of an unmarried woman, it gives it equally against the separate estate of a *feme covert*." And in this case, as in that, the consent of the husband to the making of the improvements was fully shown. And in that case, while it was held that for want of certain allegations and proof the plaintiff was not entitled to relief out of the separate estate of the wife on strictly equitable grounds, independent of his statutory lien, it was expressly held that he was entitled to enforce his statutory mechanic's lien upon her separate property; and upon this ground the judgment was affirmed. It follows that the position of the respondent's counsel is not well taken. In this connection, we refer to section 3, chapter 69, page 500, General Statutes, though we do not propose to construe that

statute at this time. It is there provided that "whenever any property is secured to the sole and separate use of a married woman, or conveyed, devised, or bequeathed to her pursuant to any of the foregoing provisions, she shall, in respect to all such property, and the rents, issues, and profits thereof, have the same rights and powers, and be entitled to the same remedies in her own name, and be subject to the same obligations, as a *feme sole*."

It is further contended by the respondent's counsel that "the lien under the statute is a personal right given to the material-man alone for his protection"; in other words, the lien is not assignable. We do not agree to this. Section 14 of the lien act (chapter 90, General Statutes) provides that "executors and administrators, under this chapter, have the same rights, and are subject to the same liabilities, that their testator or intestate would be or might have, if living." See also Gen. Stats., sec. 1, c. 77. It is a settled general rule that whatever rights of action or of property survive to an executor or administrator are assignable: *People v. Tioga*, 19 Wend. 73; *Seers v. Conover*, 34 Barb. 380; *Hoyt v. Thompson*, 5 N. Y. 347.

Applying this rule, it would follow that, under our statute, the lien of a material-man or mechanic is assignable, and by section 26, chapter 66, General Statutes, the assignee, as the real party in interest, would be entitled to enforce the lien in his own name. There is nothing in our statute to prevent us from applying the rule of assignability referred to to cases of this kind. Section 8 of the lien act expressly provides that "every person holding such lien may proceed to obtain a judgment," etc. It is true that the cases cited by counsel in *Caldwell v. Lawrence*, 10 Wis. 331, and *Pierson v. Tinker*, 36 Me. 384, appear to deny the assignability of liens, but the denial does not appear to rest on satisfactory reasons, and our statutory provisions in regard to liens differ somewhat from those of Maine and Wisconsin. *Daubigny v. Duval*, 5 Term Rep. 604, cited by respondent's counsel, is authority only for the proposition that a factor has no right to pledge the goods of his principal; and as to this case, see Story on Bailments, secs. 325-327. On the other hand, liens of this kind appear to be held assignable in *Goff v. Papin*, 34 Me. 178.

We can conceive of no reason in the nature of things why an assignment of the debt or account, and the lien, such as

was made in this case, should not be valid, so that the assignee can enforce the lien in his own name.

The claim of the material-man and the lien are certainly the property of the material-man, and why should he not have the right to dispose of both? There is nothing in the lien right of the nature of a personal trust. The lien-holder is not intrusted with the possession of the property bound by the lien. His lien is a security. What difference can it make to the lienor who holds the lien? His duty is to pay the debt. If he pays it, his property is discharged. If he fails to pay it, and so loses the property, of what moment is it to him whether the lien is enforced by the material-man or by his assignee?

So far as considerations of this kind are concerned, we are unable to see why the quality of assignability should not be attributed to a mechanic's lien as well as to a judgment lien, a lien by mortgage, or the special property of a pawnee. The lien law is designed for the protection of the material-man, the mechanic, and other persons performing labor upon buildings. As an assignment is not prohibited, and there is nothing in the nature of a lien which would render its transfer improper or injurious, and as the lien is wholly a creature of statute, the statute should be so construed (if it fairly may be) as to make the protection which it designs to afford as valuable and effectual as possible. And upon these grounds, we think, the assignability of mechanics' liens ought to be sustained, if fair construction will permit it, for it is apparent that the right to dispose of his lien—to realize from it without waiting for the slower process of the law—may be of great advantage to the lien-holder, and cannot possibly injure the lienor.

The last point made by the respondent in support of the conclusion of the court is based on this state of facts. It appears that the school-land certificate held and owned by Kate C. Howe covered the whole of a lot known as lot 4, containing two and a half acres; that the house was situate on the northwest part of it, about one hundred feet from the northwest corner of said lot. It also appears that the Whitcombs claimed their lien upon a part of said lot, commencing at the northwest corner thereof, such part being twenty rods in length from east to west, and eight rods in width from north to south, and including the house; that is to say, the Whitcombs

claimed a lien upon one acre of land out of the tract,—one acre being all upon which they could claim a lien, inasmuch as the tract was within the limits of the city of Rochester.

The respondent insists that the conclusion of the court was right, because it was not in the power of the lien claimants to carve out one acre from the larger tract in a form to suit themselves, and that the owners, as homestead claimants, should be consulted. Admitting that Heaney, the only defendant appearing, and who claims no homestead right for himself, can be heard to make an objection of this kind, we are of opinion that the objection is untenable. The lien law gives no direction as to how the acre shall be carved out of the larger tract. The lien given is upon the building, and upon the right, title, and interest of the owner of the building in and to the land upon which the same is situated, not exceeding in extent one acre. As the statute gives the lien upon one acre only, it is necessary that the acre (if part of a larger tract) should be described in the lien claim required to be filed, in order that all persons may have notice of what land is affected by it. And as there is no provision of law by which the lien claimant is authorized to call upon or compel the owner of the land to designate the acre, we see no reason why he should not be permitted to designate it himself. If his designation might sometimes unnecessarily prejudice the rights of the land-owner, it is equally true that a designation by the land-owner might seriously affect the value of the lien. As far as the homestead right is concerned, it is to be borne in mind that it does not appear in this case that the premises were a homestead at the time when the lien right accrued. The lien right is certainly paramount to any homestead right acquired subsequent to its inception. But if it be necessary (as we construe it to be) for the lien claimant to designate in his lien claim the particular acre of land upon which he claims a lien, and by the selection of such acre as a homestead, the land-owner may prevent it from being sold in the enforcement of the lien, the effect would be to make the lien subordinate to a homestead right acquired after the lien had accrued.

We are therefore of opinion that, as the statutes now stand, the lien claimant, having a lien anterior and superior to a homestead, may enforce the same without any reference whatever to such homestead right, and that the homestead claimant cannot be permitted to exercise a right of selection of the

land which he regards as his homestead so as to interfere with the enforcement of the lien.

These are all the points which we are called upon to consider in this case, and from the views expressed it follows that the court below erred in its conclusion of law.

The judgment must therefore be reversed, and the case remanded for further proceedings in accordance with this opinion.

ESTATES AND INTERESTS AFFECTED BY MECHANICS' LIENS: See *McCarty v. Carter*, 95 Am. Dec. 572, note 576; *Loonie v. Hogan*, 61 Id. 683, note 688, where this subject is discussed at length.

MECHANIC HAS NO LIEN FOR EXPENDITURE ON WIFE'S PROPERTY AT SOLE INSTANCE OF HUSBAND: *Knott v. Carpenter*, 75 Am. Dec. 779.

ASSIGNABILITY OF MECHANIC'S LIEN: See *Jaeger v. Bossieux*, 76 Am. Dec. 189, note 202; *Bradley v. Spofford*, 55 Id. 205, note 207. The claimant of a mechanic's lien may assign both the debt and the lien: *Merchant v. Ottumwa Water Power Co.*, 54 Iowa, 454; *Murphy v. Adams*, 71 Me. 118; *The Champion*, Brown's Adm. 535, all citing the principal case.

BRACKETT v. EDGERTON.

[14 MINNESOTA, 174.]

SEPARATE WRITTEN INSTRUMENTS MADE AT SAME TIME, between the same parties, and with reference to the same transaction, are to be read together and construed as parts of the same transaction.

SPECIAL DAMAGES CANNOT BE RECOVERED, UNLESS PARTICULARLY SET UP.

DEMAND MADE ON SUNDAY FOR DELIVERY OF WHEAT under a contract is a nullity, and cannot be validated by any act of the party upon whom it was made.

EVIDENCE TENDING TO ESTABLISH FACT WHICH IT IS OFFERED TO PROVE is properly received, although it may not be the most satisfactory.

WITNESS WHO IS PURCHASING WHEAT WITH REFERENCE TO PARTICULAR MARKET, is buying and selling in that market, and is kept informed as to the prices by circulars and correspondence, is competent to testify as to the value of wheat in that market.

WHERE PARTIES TO CONTRACT FOR SALE OF WHEAT AGREE UPON PERSON TO INSPECT and grade it, and that if, upon inspection by him, any of it should prove to be inferior to No. 1, the seller should pay the difference in value, it being left with the purchaser to call on the inspector if he considered any wheat of an inferior grade, the purchaser can only be allowed damages on account of the inferior quality of the wheat which he had inspected according to the contract.

PLAINTIFF IN ACTION FOR BREACH OF CONTRACT TO DELIVER WHEAT IS NOT ENTITLED TO INTEREST from the date of the contract, but only from the time of its breach.

ACTION for damages for breach of contract. The facts appear from the opinion.

Gaston and Lewis, for the appellant.

Cornell and Bradley, for the respondent.

By Court, WILSON, C. J. The plaintiff and defendant, on the twentieth day of April, 1865, entered into a written contract in these words:—

“ST. PAUL, April 14, 1865.

“George A. Brackett, of Minneapolis, Minnesota, bought of E. S. Edgerton, of St. Paul, 5,050 bushels of No. 1 wheat at the market value of such wheat this day in the city of Milwaukee, to wit, at \$1.15 per bushel, amounting to the sum of \$5,807.50, out of which sum said Edgerton is to allow said Brackett 42½ cents per bushel for freight and wastage in transporting said wheat from Ottawa, Le Sueur County, Minnesota, to said Milwaukee, Wisconsin, and also to refund to said Brackett the amount of the government tax on the shipping of said wheat. Said Edgerton guarantees said wheat to be all No. 1 wheat, and to be inspected by B. Beaupre, of St. Paul, Minnesota; and if any of said wheat, upon inspection by said Beaupre, should prove not to be No. 1, said Brackett is to take it notwithstanding, but said Edgerton is to refund to said Brackett the difference between the market value of such wheat and No. 1 wheat, at said Milwaukee on said fourteenth day of April, 1865.

“Calculation on the above:—

5,050 bush. wheat @ \$1.15.....	\$5,807 50
Freight, etc., on same.....	2,148 25
	<hr/>
	\$3,661 25
Gov't tax on shipping.....	50 50
	<hr/>
	\$3,610 75

“Said wheat to be received by said Brackett at Ottawa, Le Sueur County, Minnesota.

{ U. S. Rev. Stamp, }
5 cents.

“ERASTUS S. EDGERTON,
“GEORGE A. BRACKETT. [Seal]

“Witness: W. B. BELL.”

The referee who tried the case has reported as the facts:—

“That said plaintiff and defendant, at St. Paul, in the state of Minnesota, on the twentieth day of April, 1865, did exe-

cute and deliver the contract for the sale and purchase of wheat set out in the complaint in this action, and the plaintiff then and there paid the defendant for said wheat the said contract price.

"That on the twentieth day of April, 1865, at said St. Paul, and at the same time of the execution of and delivery of said contract, the defendant executed and delivered to the plaintiff two several orders for the delivery of the wheat sold and purchased by said contract, in the words and figures following, to wit:—

"N. & C. A. Dane will please deliver to George A. Brackett, or order, the amount of three hundred (300) bushels No. 1 wheat, to be delivered at boat at Ottawa, in sacks, free of charge, said Brackett furnishing sacks.

"E. S. EDGERTON.

"St. PAUL, April 20, 1865."

"Messrs. Wm. S. Hazzard & Son will please deliver to George A. Brackett, or order, the amount of four thousand seven hundred and fifty (4,750) bushels No. 1 wheat; said wheat to be sacked and delivered to boat at Ottawa, Minnesota, free of charge, said Brackett to furnish sacks.

"E. S. EDGERTON.

"St. PAUL, April 20, 1865."

He has found as conclusions of law:—

"That the said defendant did break and violate said contract in this: that he did not deliver to said plaintiff the amount of 5,550 bushels of No. 1 wheat at or to the boat at Ottawa, as by the terms of said contract he was bound to do, but did only deliver the amount of 4,245 bushels and 19 pounds of No. 1 wheat at boat at said Ottawa, and 415 bushels and 57 pounds of No. 2 wheat, and 27 bushels and 27 pounds of rejected wheat, and 4 bushels and 30 pounds of stump-tail wheat, at said place last above named."

The contract first above set out, and the orders for the wheat set out in the report of the referee, being part of the same transaction, are to be read together, and they clearly show that the agreement was, that the defendant should deliver the wheat in sacks free of charge to or at the boat at Ottawa, and the parties by their agreement have so interpreted it.

The appellant's position, therefore, that the delivery of the warehouse receipts was constructively a delivery of the wheat and a fulfillment of the contract on his part is untenable.

We consider his position also untenable as to the "330 or 340 sacks hauled to the levee." He cannot be heard to say now that that constituted a delivery, he having received the wheat back into his warehouse, and subsequently delivered it to the plaintiff under the contract; and whether it was a delivery or not is wholly immaterial, for it appears from the evidence that it has all been received and accounted for to him by the plaintiff.

The plaintiff cannot recover the expense of sending the barge to Ottawa. It may well be doubted whether that was either the natural or proximate consequence of the breach of the contract. If not, it could not be recovered, even if specially alleged.

It does not appear that it was in contemplation of the parties that the wheat should be shipped otherwise than by the regular line of boats on that river. But, however that may be, the item is not recoverable as general damages, for it cannot be presumed to have resulted from the breach; it certainly is not the necessary result of it, nor is it recoverable as special damages, not having been alleged. If special damage is not particularly set up, it cannot be recovered: See 2 Greenl. Ev. 244-256; Sedgwick on Damages, c. 3; 1 Chitty on Pleading, 338-395.

For another reason this item was improperly allowed. It does not appear that the defendant was in fault for not shipping by the barge. It arrived at Ottawa, and the demand for the wheat was made, on Sunday.

The demand on that day was illegal, and a nullity, and it would have been a violation of law for the defendant to have complied with it. Our statute provides that "no person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, except only works of necessity and charity, . . . on the Lord's day, commonly called Sunday, and every person so offending shall be punished by fine," etc. The legislature intended to prohibit any secular business (not a work of necessity or charity) on that day, and the demand made in this instance, as well as a compliance with it, would manifestly fall within the prohibition: *Tucker v. Mowrey*, 12 Mich. 378; *Pattee v. Greely*, 13 Met. 284.

It is argued that "the warehouseman, by declining to deliver on the ground that the county treasurer held the wheat for a tax, waived all other grounds, and excused the making of any other demand." But it was not a matter that the

warehouseman or defendant could validate. The law is not enforced for the benefit of either, but to prevent the desecration of the day. The demand was void, not merely voidable.

The warehouseman was the defendant's agent for the purpose only of delivering the wheat, and it does not appear that he missed or neglected any opportunity to deliver it, except on Sunday as aforesaid. His statement that the wheat was seized by the county treasurer does not prove that fact; nor is there any evidence to show that he could not or would not have shipped on the day following.

It is argued by the appellant that the evidence showing the number of bushels of wheat received at Minneapolis did not tend to show the number delivered at Ottawa, and therefore should not have been received against his objection.

The plaintiff testifies on this point: "The wheat was weighed at our mills; I kept account of the sacks sent; all were returned, some with wheat and some without; there was no shortage until after I had received three thousand nine hundred bushels, except fifteen bushels. All the sacks that came after that were full." The plaintiff furnished the sacks, and it is not pretended that any of the wheat was delivered except in his sacks. While this evidence may not be the most satisfactory, it certainly tended to establish the fact which it was offered to prove, and therefore was properly received.

The appellant also argues that Brackett's evidence was not admissible on the issue of the market value of wheat at Ottawa. He testified: "I received the wheat demanded at Ottawa from or about July 10th to July 15th. On the 17th of August, 1865, 290 bushels and 20 pounds. I am a miller; was then; was in the habit of buying wheat in different places in the state, in 1865." This question was then propounded to the witness: "Do you know what was the market value of wheat at Ottawa when you made the demand?" "Objected to on the ground that it did not appear that witness was acquainted with the wheat market at Ottawa." The objection was overruled, and the defendant excepted to the ruling, and the witness answered: "I was acquainted with the price at that time. No. 1 was worth, at Ottawa, then \$1.20 per bushel," etc. The question asked only called for the witness's knowledge of the price of wheat, and as this is a question on which it was competent for him to testify, the answer was properly received.

Whether it would have been competent for the witness to

testify as to the price of wheat at Ottawa from his personal knowledge of the price at other places in the state, is a question not raised by the objection of the defendant. The plaintiff, when on the stand as a witness, testified: "I knew the value of wheat of the different grades, in Milwaukee, in April, 1865. I was buying wheat at that time with reference to the Milwaukee market. Had correspondence and circulars on the subject. I was shipping flour to the Chicago market. We frequently exchanged wheat receipts for wheat in Milwaukee for wheat here, parties paying the difference in transportation, insurance," etc. Witness was then asked: "What was the difference at that time of No. 1 and No. 2 wheat in Milwaukee?" The ruling of the referee admitting the answer to the question is alleged as error, on the ground that the witness had not the requisite knowledge to enable him to testify. We are of the opinion that the referee was right in receiving the testimony.

The information which the witness acquired by the means stated was as full, accurate, and reliable as could have been acquired in any other way. On such information business men rely and act in their most important pecuniary matters. It appears from the evidence that the wheat was inspected in the plaintiff's mill, and that only that part was inspected which he was unwilling to receive as No. 1. He testified: "I think I took as No. 1 about three thousand six hundred bushels before Kelly was called on. I notified defendant that there was a quantity of wheat that I could not take as No. 1. This was in July, a few days before we saw Kelly in St. Paul. We then agreed upon Mr. Kelly to inspect the wheat at the mill. Kelly did inspect the wheat very soon after this."

The parties having agreed upon an inspector by whom the grade of any wheat was to be fixed which the plaintiff considered inferior to No. 1, and it having been left with the plaintiff to have it graded according to the contract or to receive it as No. 1 at his option, he is bound by the contract, and can legally be allowed no deduction on wheat which he neglected to have thus inspected. The contract of the parties is, "that if any of said wheat, upon inspection by said Beaupre [Kelly] should prove not to be No. 1, . . . said Edgerton is to refund said Brackett the difference," etc.

It was competent for the parties to settle by the contract the mode of inspection, and the conditions on which the plaintiff should be entitled to a deduction from the price; and

having done so, the plaintiff cannot recover on a breach of the contract with which it appears he has not complied, or without the performance of an act which is made a condition precedent to a right to recover.

In allowing the deduction on the wheat not inspected, we think the referee erred. We think he also erred in the allowance of interest to the plaintiff from the date of the contract on the value of the wheat not delivered. While interest is allowed from the date of the contract, the value of the wheat is fixed at a much later date, and at a much higher price than it rated when the contract was made. The contract did not pass the title. It does not appear that the wheat sold was at the time of the sale separated or set apart. Indeed, it appears, on the contrary, from the evidence, that it was not, but that part of it was subsequently purchased.

There was, therefore, neither an actual nor a constructive delivery. The legal effect of the contract was, that the defendant should deliver to the plaintiff the number of bushels of wheat of the grade specified, at Ottawa, on demand, within a reasonable time. Until such demand, there was no default, and it is not proven that a legal demand was made any given length of time before the commencement of this action. The referee found "that the plaintiff made a demand before the commencement of this action." How long before does not appear. Before default, defendant was not liable for damages, and as the interest is only allowable as damages, it could only commence to run after default. The allowance for extra freight is erroneous. It seems to be founded on the demand made on Sunday, which we hold gave the plaintiff no right. Except in failing to comply with that demand, it does not appear that the defendant was in default until he had delivered all the wheat which the plaintiff has received under the contract.

Judgment reversed.

CONTRACTS MADE ON SUNDAY: See *Puts v. Wright*, 95 Am. Dec. 705, note 709, where other cases are collected.

SPECIAL DAMAGES MUST BE PARTICULARLY STATED: See *Stevenson v. Smith*, 87 Am. Dec. 107, note 109, where other cases are collected.

CONTRACTS WHEN TO BE CONSTRUED TOGETHER: See *Adair v. Adair*, 71 Am. Dec. 779, note 785; *Dunlap v. Wright*, 62 Id. 506, note 511, where other cases are collected.

GOETZ v. FOOS.

[14 MINNESOTA, 265.]

PROMISE MADE TO DEBTOR TO ANSWER FOR HIS DEBT TO ANOTHER is not within the statute of frauds.

APPEAL. The opinion states the case.

Baxter and Sargent, and I. V. D. Heard, for the appellant.

Warner and Peck, for the respondent.

By Court, BERRY, J. The finding of the judge before whom the action was tried below, so far as it is material to be considered here, is as follows:—

“I find for facts, that the plaintiff and defendant were in partnership in the manufacture of brick; . . . that . . . the plaintiff agreed to sell his interest in the . . . brick-yard and fixtures connected therewith for the sum of two hundred dollars, the defendant to assume the debts and liabilities existing against said firm; . . . that prior to said sale and transfer, one Henry Sauerbrey had turned out to said plaintiff a horse, at the price of seventy dollars, for which he was to receive payment in brick from said yard; that the said Sauerbrey did not obtain payment in brick therefor, but the said plaintiff has paid him for the same; that the said firm did not receive the avails of said horse, nor was he made part of the partnership property, but before the consummation of said sale and transfer of the said brick-yard, the said plaintiff required, as one of the conditions of executing and delivering the writing conveying the said brick-yard, that the said defendant should pay the said debt to said Sauerbrey; and the said defendant gave said plaintiff to understand that he would pay the same, and thereupon the plaintiff completed said transfer, relying upon defendant's undertaking to pay the same. I find, as a conclusion of law, that the defendant is liable to plaintiff in this action for the said sum of seventy dollars, with interest,” etc.

The evidence upon which this finding is based is not returned here.

The appellant, who was defendant below, insists,—1. “That the promise of the defendant to pay the debt due from the plaintiff to Sauerbrey (if any such promise was made), not being in writing, is within the statute of frauds, and therefore void.” The point is not well taken. The debt, in this case, was owing by the plaintiff to Sauerbrey, and the promise to

pay it was made, not to Sauerbrey, but to the plaintiff. A promise of this character is not within the provisions of the statute of frauds relating to promises "to answer for the debt, default, or doings of another." This provision applies only to promises made to the persons to whom another is liable: *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Barker v. Bucklin*, 2 Denio, 60 [43 Am. Dec. 726]; *Alger v. Scoville*, 1 Gray, 391; *Perkins v. Littlefield*, 5 Allen, 370.

The appellant insists, — 2. That there was no consideration for the alleged promise; and 3. That there was no promise to pay the debt. But whatever might have been the original agreement between the parties, it appears to be found by the court below that, before the consummation of the sale and transfer of the brick-yard and fixtures, the payment of the debt was required by the plaintiff as a condition of executing and delivering the instrument by which the transfer was evidenced; that is to say, the plaintiff insisted on making a new bargain, and if the defendant saw fit to assent to it before the sale was consummated and the property transferred, the sale and transfer of the property, and the execution of the proper evidence thereof, would furnish a sufficient consideration.

It is further found that the defendant gave the plaintiff to understand that he would pay the Sauerbrey debt; that the transfer was completed by the plaintiff in reliance upon this "undertaking" on the part of the defendant. This shows a sufficient promise. These are the only points to which our attention is called by the appellant; and as we think them untenable, the judgment is affirmed.

PROMISE TO PAY ANOTHER'S DEBT WHEN NOT WITHIN STATUTE OF FRAUDS: See *Packer v. Benton*, 95 Am. Dec. 246, note 250, where other cases are collected. A promise to a debtor to pay his debt is an original undertaking, and not within the statute of frauds: *Sonsby v. Keeley*, 7 Fed. Rep. 449, citing the principal case.

TOWN v. WASHBURN.

[14 MINNESOTA, 262.]

JUDGMENT MAY BE RECOVERED AGAINST ONE OR MORE JOINT CONTRACTORS, although the statute of limitations has barred the action against the others.

ACTION against indorsers of a note. On May 18, 1858, E. B. West made his note payable in ninety days after date to the order of D. Morrison & Co., a firm composed of D. Morrison,

C. C. Washburn, and E. B. Washburn. The firm indorsed the note to the plaintiff. After nearly nine years the plaintiff sued the indorsers; to avoid the statute of limitations he alleged that C. C. and E. B. Washburn had been absent from and residing out of the state more than eight years prior to the commencement of the action. The defendants demurred on the ground that the action was barred by the statute of limitations. The demurrer was overruled, and the defendants appealed.

Cornell and Bradley, for the appellants.

Wilson and McNair, for the respondent.

By Court, WILSON, C. J. We are of the opinion that the order appealed from should be affirmed. *Denny v. Smith*, 18 N. Y. 567, decided under a statute substantially the same as ours, is in point, and we are satisfied with the reasoning and conclusion of the judge who delivered the opinion of the majority of the court in that case. See also *Didier v. Davison*, 2 Barb. Ch. 477-487; *Fannin v. Anderson*, 7 Q. B. 811. Our statute is in these words:—

Section 3, chapter 66, General Statutes: "Actions can only be commenced within the periods prescribed in this chapter after the cause of action accrues, except where in special cases a different limitation is prescribed by statute."

Section 15: "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited after his return to the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action."

We must give to the words of the statute their natural and obvious meaning, and this constitutes the law as a shield to the defendant Morrison against this action, he having been within the jurisdiction of the court for more than six years before suit brought, and after the cause of action accrued; but not to the other defendants, who have not been six years within the jurisdiction of the court.

To use the language of the court of appeals of New York, in the case above cited, "it appears to have been the manifest intention of the legislature to subject any debtor during a period of six years after the accruing of a debt to the reach of civil process at the suit of his debtor." The argument that

Morrison may be compelled to contribute, and therefore be practically deprived of the benefit of the statute, would be more properly addressed to the legislature than the court; it might tend to prove a *casus omissus*, which cannot be remedied by us. It is even held that cases within the reason but not within the words of the statute are not barred, but may be considered as omitted cases which the legislature have not deemed proper to limit: *Bedell v. Janney*, 4 Gilm. 208, and cases cited.

But it is urged that the plaintiff must recover against all the defendants that were members of the firm of D. Morrison & Co., or none; and in support of this position are cited *Fetz v. Clark*, 7 Minn. 217, and *Whitney v. Reese*, 11 Id. 138.

Speaking for myself, I may say that these cases have gone full far enough in the direction indicated, but they have not gone nearly to the length which the defendants ask us here to go. They only held that, in an action against two or more, on a joint contract or debt, a plaintiff cannot recover against one of the defendants on his individual contract or indebtedness.

In the last case, the statute having run, Heylin could not, after the partnership had been dissolved, revive the debt against his former copartner or the former firm, but the old debt was a sufficient consideration to support the promise; but it was his individual promise and contract, and not that of Reese and Heylin. A recovery, therefore, could not be had on the partnership contract or indebtedness which was barred by the statute, but only on his individual contract, subsequently made. The case at bar is entirely different. Suit is brought and judgment asked on the original joint contract made by the firm of D. Morrison & Co. The cases cited, therefore, we think, are not authorities for the defendants.

Order affirmed.

STATUTE OF LIMITATIONS AFFORDS PROTECTION TO EACH OF TWO OR MORE PERSONS JOINTLY BOUND: *McCarthy v. White*, 82 Am. Dec. 754. Referring to the rule in the principal case, Berry, J., in delivering the opinion of the court in *Miles v. Warr*, 27 Minn. 59, said: "If it was technically correct, it certainly did not tend to promote substantial justice. At any rate, it has been abrogated by the laws of 1873, chapter 67."

HORTON AND WIFE v. MAFFITT AND WIFE.

[14 MINNESOTA, 289.]

DECREE IN SUIT FOR PARTITION DIRECTING SALE of the property, instead of setting it off to one of the co-tenants upon his paying to the other the value of his interest, is proper.

ESTATE OF PURCHASER AT FORECLOSURE SALE, PRIOR TO EXPIRATION OF TIME TO REDEEM, is that of a mortgagee before foreclosure, — an equitable estate or interest.

EITHER OF CO-TENANTS MAY REDEEM WHOLE OF JOINT ESTATE from sale thereof on foreclosure; and upon so doing, or upon taking an assignment of the certificate, he will be held to do so for the benefit of the whole estate, and will be entitled to reimbursement from his co-tenant of the amount properly chargeable to the share of such co-tenant.

REDEMPTION BY OWNER OF PROPERTY SOLD UNDER FORECLOSURE ANNULS SALE and defeats the title of the purchaser thereat.

ONE WHO ACQUIRES ESTATE OF PURCHASER AT FORECLOSURE SALE, and subsequently purchases the interest of one of two co-tenants who owned the property before the sale, has the right to hold the first-named estate or interest and enforce it for his own benefit, and this right is not impaired by his subsequently acquiring the interest of such co-tenant. No merger of the estate takes place in such case.

SHERIFF, IN RECEIVING MONEY PAID FOR REDEMPTION, ACTS AS OFFICER OF LAW, and not as the agent of the party who purchased at the sale.

ACTION for partition. The opinion states the case.

Jones and Butler, for the appellants.

Stearne and Start, for the respondents.

By Court, GILFILLAN, C. J. This is an action for partition. The court found that plaintiff Horton owns an undivided two twenty-fifths and defendant Maffitt an undivided twenty-three twenty-fifths of the premises; that defendant has paid all the taxes on them since they were owned by the parties, amounting to \$108, and built a dwelling-house on them; and directs judgment that the land without the building be sold, and the proceeds, after paying costs of sale and the disbursements in the action, be divided between the parties in accordance with their respective interests, and that defendant have sixty days after the sale to remove his building.

We see no reason to reverse or modify the action of the court below on the ground that it directs a sale of the property, instead of setting it off to the defendant, upon paying plaintiff the value of his interest.

The plaintiff in his complaint claimed that he owned thirty-one seventy-fifths and defendant forty-four seventy-fifths of the premises, but on the trial abandoned all claim

except to two twenty-fifths. The land originally belonged to Daniels, Hurd, and Taylor; and such conveyances were made that, on the 13th of May, 1865, it belonged, twenty-three twenty-fifths to Hurd, and two twenty-fifths to one Bissell. On the 16th of May, 1865, Hurd conveyed his interest to defendant, and on the 26th of February, 1866, Bissell conveyed his interest to plaintiff. On the trial defendant offered to prove certain matters alleged in his answer, substantially these:—

That while they owned the premises, Daniels, Hurd, and Taylor executed a mortgage on them, which mortgage was foreclosed by action, and the premises sold under the decree, May 13, 1865, to one Lowry, for \$140, to whom a proper certificate of sale was executed and recorded; that on December 4, 1865, Lowry assigned this certificate to plaintiff; that on the 11th of May, 1866, defendant (who appears to have been in possession) paid to plaintiff a back tax, and one year's interest on the \$140, and on the 11th of May, 1867, paid him another year's interest, and on the 8th of May, 1868, paid in to the sheriff of the county, for the purpose of redeeming the premises from the sale, \$140 and one year's interest, and that the plaintiff received from the sheriff twenty-three twenty-fifths of the money so paid, leaving two twenty-fifths in his hands. This evidence was objected to by plaintiff, and excluded by the court.

Upon this ruling the error alleged arises. The question is, Admitting all those matters to be facts, would they affect plaintiff's right to a partition as directed by the court?

We will consider the case as though those facts were proved. At the time plaintiff purchased the certificate of sale the title stood thus: Defendant held twenty-three twenty-fifths and Bissell two twenty-fifths of the legal title, subject to the estate of the purchaser at the mortgage sale. As the foreclosure was not complete, by reason of the time to redeem not having expired (*Daniels v. Smith*, 4 Minn. 172; *Donnelly v. Simonton*, 7 Id. 167; Laws of 1862, p. 73, sec. 4), the estate of the purchaser was that of a mortgagee before foreclosure, — an equitable estate or interest. Either of the co-tenants might redeem the whole estate from the sale, and upon so doing, or upon taking an assignment of the certificate, would be held to do so for the benefit of the whole estate, and he would be entitled to reimbursement from his co-tenant of the amount properly chargeable to the share of such co-tenant. After acquiring the interest of the purchaser, plaintiff took a conveyance of

Bissell's two twenty-fifths. Having acquired the purchaser's interest when the relation of a co-tenant did not exist between him and defendant, his right was fixed to hold and enforce it for his own benefit, and that right (unless by merger) was not impaired by his subsequently acquiring the title of Bissell to the two twenty-fifths.

Defendant argues that upon acquiring Bissell's title there was a merger to the extent of two twenty-fifths of the equitable in the legal estate; that the Bissell title was the equitable title to the two twenty-fifths, and that it was extinguished by the merger; and that he, defendant, acquired the purchaser's title by the redemption.

His redemption, redeeming as owner, annulled the sale so that no title could pass to him by means of it: Gen. Stats., p. 564, sec. 14; *Daniels v. Smith*, 4 Minn. 172; *Warren v. Fish*, 7 Id. 432; *Rutherford v. Newman*, 8 Id. 47. The purchaser's estate or interest was thereby defeated.

If there was a merger, it was the purchaser's estate to the extent of two twenty-fifths, which was merged and extinguished in the legal estate conveyed to plaintiff by Bissell, and by such merger the title of the parties would not be materially affected. After it, defendant could redeem by paying twenty-three twenty-fifths of the purchase-money; and without it, so long as plaintiff was the holder, both of the purchaser's interest and of the two twenty-fifths, and so liable to contribution, defendant could redeem with the same amount. The extinction of two twenty-fifths of the purchaser's estate or interest would, as will presently appear, impair plaintiff's rights as holder of that estate, respecting the possession during the time to redeem.

In equity, when the legal and equitable estate meet in the same person, they do not merge if it be his intention to maintain them separate; and such intention is presumed when it is clearly his interest that they should be kept apart. A person is ordinarily presumed to intend that which is manifestly for his interest. When we come to certain facts which defendant claims would have rebutted the presumption that plaintiff intended to keep the estates separate, it will appear that such was manifestly his interest.

The acts of plaintiff, which defendant relies on to show plaintiff's intention that the estates should merge, and which, it is insisted, estop him from claiming any title in the premises, are, that defendant was permitted, till after the time to redeem expired, to occupy and improve the property without

objection from plaintiff; that during the time to redeem, plaintiff received from defendant a back tax on the premises, and the interest on the purchase-money for the first two years after the mortgage sale, and that he received from the sheriff twenty-three twenty-fifths of the money paid by defendant to redeem the premises from the sale.

The circumstances under which the defendant improved the property, whether with or without the knowledge of plaintiff, were not proved, nor offered to be proved. How such improving by defendant, who knew his rights, and that the utmost he could then claim of the property was twenty-three twenty-fifths, subject to the mortgage sale, and his liability to his co-tenant to furnish that proportion of the money to redeem, could, under any circumstances, give him title, or divest plaintiff's title to the two twenty-fifths, it is impossible to see; nor can we see how it throws any light on plaintiff's intention with respect to a merger when he bought the Bissell interest.

The receiving by plaintiff of the back tax, and of the first two years' interest on the purchase-money, not only were not inconsistent with an intention to keep the two estates separate, but his right, as assignee of the purchaser, to receive the tax and interest, or be let into possession, made it clearly his interest that the entire estate and interest which he acquired from the purchaser should be kept distinct.

Defendant was in possession, and, to retain such possession during the three years for redemption, was required to pay to the purchaser or his assignee the tax and the interest. He made the payments to keep the possession, and to prevent plaintiff, as assignee of the purchaser, taking possession.

Keeping plaintiff's two estates separate gave him two rights with respect to the possession, — 1. The right dependent on his character as co-tenant, to wit, to be let into joint possession, or to hold the defendant to account for the possession of the two twenty-fifths; 2. That dependent on his character as assignee of the purchaser, to wit, to be let into the exclusive possession after the first year, unless defendant paid the taxes, and paid him the interest annually.

It is clear that he could not exercise both of these rights. Having elected which he would exercise, he was bound to rely upon that during the three years.

The effect, however, of his electing to receive, and of his receiving, as assignee of the purchaser, the tax and the interest,

could not extend beyond that for which they were paid, to wit, the possession of the property during the time for redemption. His receiving them was evidence (such as would estop him) of his intention to rest upon his purchaser's title with respect to the possession during the three years, if defendant insisted upon holding the possession, but no evidence of an intention to waive or abandon any other right dependent on his Bissell title.

The twenty-three twenty-fifths of the money which defendant paid to the sheriff for the purpose of redeeming was what plaintiff had a right to receive, and to require defendant to pay, whether his purchaser's title to the extent of two twenty-fifths was merged in the title he derived from Bissell or not. If it were merged, it would operate as a redemption to that extent by him; and defendant could not claim the benefit of redemption without paying the balance. If it were not merged, then there was a duty on the part of each co-tenant to contribute towards the redemption in proportion to the quantity of his interest, the defendant's being twenty-three twenty-fifths.

Defendant paid the sheriff more than he need have paid. As between plaintiff and defendant, all that defendant could be required to pay to clear off the encumbrance was twenty-three twenty-fifths, and as plaintiff was the party to receive what he paid, that is all he need have paid the sheriff. Under such circumstances it would be useless circuitry to require of a party to pay the whole, and then receive part of it back again.

Defendant might have redeemed by paying, or tendering payment, to the plaintiff; and surely had he paid or tendered plaintiff all which, as between them as co-tenants, plaintiff was entitled to require of him, it would have been a good redemption. And the same amount paid to the sheriff for plaintiff would have had the same effect. Defendant claims that plaintiff has received the whole of the redemption money, because the whole was received by the sheriff, who, as defendant argues, was by law plaintiff's agent. This is not so. The sheriff is in no sense the agent of the party. He acts in his official capacity as the officer of the law, with whom a party redeeming may deposit the money, instead of paying it to the party entitled to it.

If the sheriff receives too much or too little, or from one not entitled to redeem, that cannot prejudice the party hold-

ing the certificate of sale. It is the business of the party redeeming to see that he deposits with the sheriff the proper amount; and if the amount be not correct, he must bear the consequences. There was no error in excluding the testimony.

The order denying the motion for a new trial is affirmed.

ONE CO-TENANT PURCHASING OUTSTANDING TITLE OR REMOVING ENCUMBRANCE, RIGHTS OF: See *Titsworth v. Stow*, 95 Am. Dec. 577, note 579, where other cases are collected.

WHEN SALE DECREED IN PARTITION SUIT: See *Dall v. Confidence S. M. Co.*, 93 Am. Dec. 419, note 424, where other cases are collected.

SHERIFF, WHEN AGENT OF PLAINTIFF: See *Harris v. Ellis*, 94 Am. Dec. 296.

MOOR v. FOLSOM.

[14 MINNESOTA, 240.]

WHERE MAKER AND HOLDER OF OVERDUE NOTE AGREE FOR EXTENSION of its payment for about ten months, provided a third person be procured to indorse it, and such third person, without any knowledge of such agreement, writes his name on the back of it, with the date, this does not amount to a taking up and reissue of the note. Such third person is not to be treated as a maker, because he did not sign at the time of the making of the note; nor as a guarantor, because the contract of guaranty was not written out expressing the consideration; and if considered an indorser, it was of a note payable on demand, and he was entitled to demand and notice within a reasonable time, and was discharged by the agreement, made without his consent, to forbear.

APPEAL. The opinion states the case.

L. M. Stewart, for the appellant.

H. J. Horn, for the respondent.

By Court, GILFILLAN, C. J. After a promissory note became due, the maker and holder agreed that if the former would procure defendant to indorse it, the latter would extend the time of payment about ten months.

The defendant, at the request of the maker that he would indorse a note for him, but without any knowledge of said agreement, wrote his name on the back of the note, at the same time writing over his signature the date of his signing. In consequence thereof, and relying thereon, the holder extended the time of payment about ten months, whether by oral or written agreement does not appear. At the end of the year, payment was demanded from the maker, and refused,

and notice thereof given to defendant. If upon these facts defendant is liable, it is immaterial in what character,—whether as maker, indorser, or guarantor. At the time of his indorsing, the note was outstanding, and past due. It is contended that the transaction is equivalent to the taking up and reissuing of the note; that in law it became a new note. If so, as it was past due, and as it was not altered in respect to the time of payment expressed in it, it was in effect payable on demand; and the defendant, if treated as an indorser, would have the right to a demand and notice within a reasonable time. Whether they were within a reasonable time is not found. From the facts found, *prima facie* they were not. In such case, too, the indorser would be discharged by the agreement, made without his consent, for forbearance.

It is also argued that the indorsement by defendant gave the maker or holder authority to alter the note so as to make it payable at a different time from that expressed in it, and that it is therefore analogous to those cases where one makes or indorses a bill or note with blanks in it, and delivers it to another to fill the blanks and put it in circulation. If the indorsing by defendant were sufficient, under the circumstances, to authorize the maker or holder to alter the note, and make it payable at a different time, the case still differs from those cited in this, that such alteration was not in fact made. No recovery was ever had on a note imperfect by reason of blanks, whatever authority there may have been to fill them. To make this analogous to those cases (admitting the authority to alter), the time of payment should have been altered in the note. An agreement between the maker and holder, independent of and not inserted in or made a part of the note, could not have the effect of an alteration so as to make defendant liable as maker or indorser beyond the legal effect of it as it appears on its face. The note, however, cannot be considered as taken up and reissued. It never ceases to be the property of the holder. The agreement to forbear did not make it a new note. The case does not come within the class where one signing his name on the back of a note is held as a maker. In those cases, the signature was given at the time of making the note, or in so short a time afterwards, and under such circumstances, as to have relation to the making of the contract originally: *Oxford Bank v. Haynes*, 8 Pick. 423 [19 Am. Dec. 334].

The defendant cannot be held as maker or indorser. Can

he be held as a guarantor? In the case of an indorser, the mere signature is sufficient; the law imports the contract. It is otherwise with the guarantor. His contract being a collateral one, to answer for the debt of another, must, under the statute of frauds, be evidenced by note or memorandum in writing, expressing the consideration. The mere signature on the back of the note is not sufficient.

Where one indorses a note for the purpose of assuming the liability of a guarantor, the act is held to authorize the holder to write over the signature the contract of guaranty in full; and that being done, it is a sufficient note or memorandum in writing to take the case out of the statute: *Beckwith v. Angell*, 6 Conn. 315; *Ulen v. Kittredge*, 7 Mass. 233; *Tenney v. Prince*, 4 Pick. 385 [16 Am. Dec. 347]; *Nelson v. Dubois*, 13 Johns. 175; *Campbell v. Butler*, 14 Id. 349; *Tilman v. Wheeler*, 17 Id. 325.

But without the contract being so written out, there can be no recovery as on a contract of guaranty. As it was not done in this case, it is unnecessary to consider whether, upon the principle of estoppel or otherwise, the maker or holder had authority to do it.

The judgment below is affirmed.

INDORSER WHEN DISCHARGED BY EXTENDING TIME OF PAYMENT: See *Place v. McIlvain*, 97 Am. Dec. 777.

HOLDER OF NOTE MUST MAKE DEMAND AND GIVE NOTICE TO HOLD INDORSER: See *Tate v. Sullivan*, 96 Am. Dec. 597, note 612, where other cases are collected.

INDORSER OF NOTE WHEN PRESUMED TO BE GUARANTOR: See *Dietrich v. Mitchell*, 92 Am. Dec. 99, note 102, where other cases are collected; *Good v. Martin*, 91 Id. 708, note 710; *Killian v. Ashley*, 91 Id. 519.

CONSIDERATION OF GUARANTY, WHEN REQUIRED TO BE IN WRITING: See *Van Doren v. Tyader*, 90 Am. Dec. 498, note 502, where other cases are collected.

GREVE v. COFFIN.

[14 MINNESOTA, 345.]

PLAINTIFF IN EJECTMENT MUST RECOVER ON STRENGTH OF HIS OWN TITLE. MISTAKE IN DESCRIPTION OF LAND IN DEED MAY BE CORRECTED BY SUBSEQUENT DEED thereof, executed by the same grantor, for the purpose of correcting the description and confirming in the grantee the title to the land intended to have been described in the prior deed, and the two deeds, taken together, will operate to pass the title to the grantee named therein.

AD VALOREM STAMP IS NOT REQUIRED ON DEED REFORMING DESCRIPTION IN PRIOR DEED of the same premises. A stamp affixed to such deed as a contract or agreement is sufficient.

POWER OF ATTORNEY EMPOWERING ATTORNEY, AMONG OTHER THINGS, "TO BUY AND SELL REAL ESTATE, and in my name to receive and execute all necessary contracts and conveyances therefor," does not authorize such attorney to sell and convey lands to which, as the proper record shows, the principal has acquired title before the execution of the power. Such power is to be construed as having reference to a business to be inaugurated after its execution.

CONVEYANCE BY MORTGAGEE OF MORTGAGED PREMISES TO THIRD PARTY IS ENTIRELY INOPERATIVE, unless it was intended to operate as an assignment; and such intention must be made to appear.

PARTY CLAIMING UNDER TAX DEED MUST SHOW THAT LAND HAD NOT BEEN REDEEMED when such deed was made, before it can be received as *prima facie* evidence of title, under the Minnesota statute.

CHARGING LAND ON TAX LIST IN NAME OF PERSON OTHER THAN TRUE OWNER invalidates the tax sale, unless the land be otherwise correctly described, and the taxes be due and unpaid at the time of the sale.

ACTION in the nature of ejectment. The opinion states the case.

Allis and Williams, for the appellant.

Brisbin and Palmer, for the respondent.

By Court, BERRY, J. This is an action in the nature of ejectment, in which the plaintiff must recover, if at all, upon the strength of her own title. It is proper, then, to inquire, first, whether she has made out title in herself. If she has not, the case is at an end; if she has, then we have to look further to see what rights the defendant has established. It appears that Levi Greve became owner in fee of the premises in controversy on the seventh day of November, 1854, by deed duly recorded on that day. On the fifth day of July, 1855, he executed and delivered to the plaintiff, Mary Greve, a deed purporting to convey certain premises, the description of which agrees in some respects with the description of the land in dispute found in the complaint, and varies from it in other respects. On the twenty-fifth day of March, 1867, Levi Greve executed and delivered to Mary Greve another deed, granting and releasing all his right, title, and interest in the premises described in the complaint. The latter deed contains this language: "This deed is made to correct description, and to confirm in Mary Greve title to land intended to have been described in and deeded by" the deed of July 5, 1855. It is claimed by the defendant that the deed of July 5, 1855, is inoperative and

void, because the description is so imperfect that it does not designate any particular tract of land.

The case comes up here as upon a bill of exceptions. It does not appear that all the evidence introduced before the district court is reported here, nor are we furnished with any map or plat. Under these circumstances, we are not able to say that the learned judge below, in finding that "Levi Greve conveyed the said premises to the said Mary Greve in fee," by the deed of July 5th, was not supported by the evidence in the case. But admitting that the description in the deed of July 5th was so imperfect that it did not convey the land described in the complaint, or any land whatever, we are of opinion that the imperfection was corrected by the deed of March 25, 1867, so that the two, taken together, would operate to pass the title to the premises described in the complaint. To this view it is objected that the deed of July 5th was absolutely void on its face for uncertainty of description, and that therefore it could not be confirmed. But this is not a fair statement of the case. If the deed of July 5th, on account of the imperfection of the description, was not effectual to pass a title, still, if the imperfection arose from mistake, the deed could be reformed in a court of equity so as to make it speak the intention of the parties, and pass the title which it was designed to pass. If it could be reformed through the action of a court, it certainly could by the acts of the parties. The deed of March 25th does not, then, operate to confirm the deed of July 5th. It operates, in its own language, to correct description, and to confirm in Mary Greve title to land intended to have been described in and deeded by the deed of July 5th. It is also said that the deed of March 25th is invalid because not properly stamped. It is admitted that the value of the property was six thousand dollars, while a fifty-cent stamp only was affixed to the deed. By the United States statute (act of July 1, 1862) "any deed . . . whereby any lands, tenements, or other realty sold shall be granted . . . or otherwise conveyed," where the consideration or value exceeds one hundred dollars, is subject to an *ad valorem* stamp duty. In our opinion the word "sold" is an emphatic word, and the *ad valorem* duty is only required to be affixed to deeds of land, etc., sold, in the ordinary sense of the word.

In this case the sale was made July 5, 1855, before the stamp act was passed. There was no sale in March, 1867. What was done then was simply to perfect the evidence of

the former sale: 3 Parsons on Contracts, 326-328, and notes. In England, under a statute similar, it is held that a deed of confirmation of an inoperative deed that was duly stamped does not require an *ad valorem* stamp, as for the sale of the property: *Doe v. Weston*, 2 Q. B. 250; 42 Eng. Com. L. 660. But if this was not so, what would be the consideration or value in this case by which the amount of stamp duty required is to be determined? The consideration expressed is one dollar, and there is no evidence that it was any greater sum. The value of the interest conveyed, what was it? Apparently nothing. If Levi Greve was simply reforming the first deed, he was only doing that which he could be compelled to do gratuitously by legal proceedings. His interest possessed no value to him. What he held he held in trust for the benefit of the plaintiff, Mary Greve. We are clear, therefore, for these, as well as for other reasons not necessary to be mentioned, that no *ad valorem* stamp was required in this case. The stamp affixed to the deed as a contract or agreement was at any rate sufficient: 3 Parsons on Contracts, 327, 328. Such is the plaintiff's title, and in our opinion it is a good title, and sufficient to enable her to sustain this action, unless the defendant has made out a better.

On the sixteenth day of February, 1855, Levi Greve, then being the owner of the premises, made and delivered to Moses H. Schwartzenbergh a power of attorney, by which he constituted said Schwartzenbergh his lawful attorney, with these powers: "For me and in my name to purchase all kinds of goods, wares, and merchandise; to execute all kinds of notes and obligations therefor; also for me and in my name to sell goods, and barter the same, and receive pay therefor; to collect, deposit, or transfer and exchange money; also to buy and sell real estate, and in my name to receive and execute all necessary contracts and conveyances therefor; and further, to do all things necessary to the transaction of a general mercantile, trading, money-lending, and other lawful and proper business." Claiming to act under this power, the attorney executed a conveyance of the premises on the twenty-sixth day of June, 1855, to Nathan Schwartzenbergh, who, on the fourteenth day of April, 1856, conveyed the same to Moses Lovenstein. Lovenstein, July 24, 1857, conveyed to Nininger, who, on the nineteenth day of August, 1857, conveyed an undivided half to Goldsmith, and on the nineteenth day of January, 1858, Goldsmith and Nininger conveyed the premises to

the defendant. It will be observed that Levi Greve acquired title to the land in controversy before the execution of the power of attorney, and that this fact appeared of record.

It is insisted by the plaintiff that the power of attorney authorized the attorney to sell and convey such lands only as he should buy under the power. We are inclined to the opinion that this is the proper construction; but at any rate, we have no doubt that the power did not authorize the attorney to sell and convey lands to which, as the proper record showed, the principal had acquired title before the execution of the power. If this is not so, then the proper construction is that contended for by the defendant's counsel, namely, that the power authorized the attorney to sell any real estate of his principal, whether owned by the principal at the time of or prior to the execution of the power, or purchased by the attorney under the power.

This construction would, as suggested by the learned judge below, allow the attorney to sell the principal's homestead; and if this construction be sound, the power would also allow the attorney to sell the principal's household goods, his wearing apparel, and any other goods, wares, or merchandise belonging to him. But we think this would be an unnatural construction of the power. It seems to us, as to the court below, that the power had reference to a business to be inaugurated. The business was one in which the attorney was to make the original investments, and to sell the goods or real estate acquired by such investments. This appears to us to be the natural signification of the language used in the connection in which it is used: See *Mills v. Carnly*, 1 Bosw. 159.

It is urged that this construction would furnish a bad and unreasonable rule, because it would require the purchaser to ascertain whether the attorney had bought the real estate which he assumed to sell, and that this is a matter which it would be almost, if not quite, impossible to determine with certainty. Whether this would be so in any instance or not, we need not inquire. In cases like this which we are considering, no such difficulty would present itself, for the records of title (as appears by the finding) show that the premises in question were purchased by Levi Greve before the power of attorney was made. It is further urged that the revocation of the power shows that the construction contended for by the defendant is that which was put upon the power by Levi Greve, the principal himself. The instrument of revocation

contains this recital: "Whereas, Levi Greve, . . . in and by a letter of attorney, did . . . appoint Moses Schwartzzenbergh . . . my attorney, for me and in my name to sell and convey lands belonging to me."

The instrument then proceeds to revoke "said letter of attorney, and any and all letters of attorney, by me heretofore executed to the said Moses H. Schwartzzenbergh, and all power and authority thereby given or intended to be given to the said Moses H. Schwartzzenbergh." The language specially relied on by the defendant in the revocation is the clause "to sell and convey lands belonging to me," and it is argued that these words refer to and construe the expression to "sell real estate" in the power. If the revocation has reference to the power, as we presume is the fact, it has certainly not attempted to recite, or specifically to refer to, all nor more than one of the many objects embraced in the power, although it revokes the power *in toto*. It contains no mention of the authority to buy or sell goods, or to buy real estate, or of the other purposes for which the attorney was appointed. This shows that it does not pretend to describe, with any approach to accuracy or definiteness, the character of the authority conferred upon the attorney, and for this reason, we think, it is not entitled to the weight which is sought to be given to it as an authoritative and conclusive construction of the original power. Its language, though not fully descriptive of the nature of the power, is not inconsistent with our construction. The power did confer the right "to sell and convey lands belonging to" Greve, but it does not follow that the attorney, therefore, had power to sell and convey all lands belonging to Greve; while, as we hold, he had power at least to sell and convey such lands belonging to Greve as had been acquired by virtue of the power. Our opinion, then, is, that the power of attorney did not authorize the sale and conveyance of the premises in controversy, and that the deed purporting to be made in pursuance thereof was entirely nugatory as a conveyance.

It appears that on the eighth day of April, 1855, which was prior to the conveyances to Nathan Schwartzzenbergh and to the plaintiff, Levi Greve mortgaged the premises in question to John Nininger, to secure the payment of \$1,690, due in two months from the date of the deed, and that on the first day of September, 1855, the mortgage was assigned to Nathan Schwartzzenbergh. There was no evidence going to show

whether the mortgage has ever been paid or not. But the defendant's counsel says that "when Nathan Schwartzenbergh subsequently conveyed these premises to Moses Lovenstein, on the fourteenth day of April, 1856, he was the assignee, owner, and holder of all the right, title, and interest, and estate granted by the mortgage deed. We claim that all his right, title, interest, and estate under the mortgage deed passed to his grantee, and subsequently from this grantee, through the other grantees, to the present defendant, who is now in the actual possession and enjoyment of the premises." And as we understand it, the defendant, upon this state of things, invokes the doctrine held in *Pace v. Chadderdon*, 4 Minn. 503, that "a mortgagee in possession of mortgaged premises, lawfully acquired after condition broken, cannot be dispossessed by an action of ejectment against him." But as it occurs to us, the first question is, Was there any assignment of the mortgage by Nathan Schwartzenbergh? It is not pretended that he ever made any formal assignment of it.

In *Hill v. Edwards*, 11 Minn. 29, it was said by this court that the mortgagee has no conveyable interest in the mortgaged premises until foreclosure sale, or at least until entry after condition broken; and a conveyance of the premises by the mortgagee to a third party, unless, at least, intended to operate as an assignment of the mortgage and transfer of the mortgage debt, is entirely inoperative, and such intention must be made to appear. This doctrine was also followed and applied in *Johnson v. Lewis*, 13 Id. 364.

Now, while in the case at bar it is found by the court below that the defendant, at the commencement of this action, was in possession of the premises described in the complaint, claiming title thereto, and also at a time when a certain tax was assessed in 1864 (as we suppose), there is nothing to show that Nathan Schwartzenbergh, or any of those who claim under him, except the defendant, as found above, were ever at any time in possession of the premises. Nor would any of them have constructive possession under the deed executed by the attorney; for, as we have already determined, that deed was made without authority, and was ineffectual as a conveyance.

It does not appear that the mortgage has ever been foreclosed, and as we have seen, there is nothing to show that Nathan Schwartzenbergh ever entered into possession of the land, either before or after condition broken, though it appears

that, at the time when the mortgage was assigned to him, September 1, 1855, which was also before he executed the deed to Lovenstein, the mortgage was nearly three months past due, and of course its condition broken, unless it had been paid or satisfied, or perhaps extended. So that, under the rule enunciated in *Hill v. Edwards*, 11 Minn. 29, Nathan Schwartzzenbergh had no conveyable interest in the premises at the time of his conveyance to Lovenstein, and his conveyance of the premises was inoperative, "unless it was intended to operate as an assignment of the mortgage," and transfer of the mortgage debt, and as further held, "such intention made to appear." Then the question is, Was the conveyance intended to operate as an assignment of the mortgage and transfer of the mortgage debt, and is that intention made to appear? We think this question must be answered in the negative. We discover nothing indicating such an intention. There was, as before remarked, no formal assignment made. It does not appear that either note or mortgage were ever delivered by Nathan Schwartzzenbergh to his grantee, or that they were ever in the hands or control of any of those who claim under him. So, then, not only no intention to assign is made to appear, but the circumstances of the case, so far as our information extends, are not easily reconciled with the existence of such intention. The facts found indicate with reasonable certainty to our minds that the intention of Nathan Schwartzzenbergh was to convey the fee-simple of the premises, and that the same intention ran through the whole series of conveyances following, including that made to the defendant. As, then, the defendant is not shown to be a mortgagee, or an assignee of a mortgagee or his assigns, he is not in a position to set up the mortgage in answer to this action.

Finally, and as one other source and evidence of title, the defendant relies upon a tax deed which is found by the court below to have been executed, acknowledged, and delivered to him by the auditor of Ramsey County on the twenty-ninth day of August, 1867. The tax sale appears to have been made on the ninth day of June, 1865, for taxes of 1864.

Section 139, page 186, General Statutes, provides that if land sold for taxes has not been redeemed within the time allowed by law, the county auditor shall, on the production of the certificate of purchase, etc., execute and deliver to the purchaser, etc., a deed of conveyance for the tract sold. Section 140 enacts that "the deed so made by the auditor shall vest in the

grantee, his heirs and assigns, a good and valid title, both in law and equity, and shall be received in all courts as *prima facie* evidence of a good and valid title in such grantee, his heirs and assigns."

We agree with the opinion of the learned judge below as to the construction of these sections of the statutes. The auditor is authorized to make the deed only in case the land sold has not been redeemed, and it is only a deed so made—that is to say, made when the land has not been redeemed—which is declared *prima facie* evidence of title. If, then, a party wishes to rely upon such tax deed as *prima facie* evidence of title, he must show that the land sold had not been redeemed when the tax deed was executed and delivered. No such showing was attempted in this case, and for this reason the tax deed does not establish title in the defendant.

We also agree to the views expressed by the learned judge in reference to section 143, page 187, General Statutes, which provides that "no sale of any land . . . for delinquent taxes shall be considered invalid on account of its having been charged on the duplicate in any other name than that of the rightful owner; provided that such land or lot is in other respects sufficiently described on the duplicate, and the taxes for which the same is sold are due and unpaid at the time of such sale."

It appeared by admissions in this case that the "name of the defendant was put upon the tax list as owner of the said land, upon the list under which the tax sale referred to in said conveyance took place, and that his name appeared also in the advertisement of such sale of said land, and that at the time of assessing such tax he was in possession of said land, claiming title thereto."

As remarked in the opinion filed below: "Here is a very clear indication of the intent of the legislature that the fact of charging land upon the tax list in the name of a person other than the true owner shall invalidate the tax sale, unless the lands be otherwise correctly described, and the taxes be due and unpaid at the time of such sale."

The deed introduced in evidence here, then, was *prima facie* evidence of title. (This remark is, of course, subject to what is before said upon the other point.) It was liable to be overcome, however, by proof of such facts as rendered the sale invalid. The proof of such a fact was given in the admissions above referred to, liable, of course, to be rebutted by evidence

that the lands were otherwise properly described, and that the tax was due and unpaid. No such evidence was given in the case. The tax lists were not produced, nor any of the records in the auditor's office. For these reasons, also, we think the defendant failed to make out a tax title. This disposes, we believe, substantially of all the positions taken by the defendant in his defense.

The plaintiff has, in our opinion, shown title, which the defendant has been unable to overcome, and the judgment in her favor is therefore affirmed.

PLAINTIFF IN EJECTMENT MUST RECOVER ON STRENGTH OF HIS OWN TITLE: See *Huntington v. Jewett*, 95 Am. Dec. 788, note 790, where other cases are collected.

WHERE EQUITY WOULD COMPEL GRANTOR TO CORRECT MISTAKE in description of land intended to be conveyed, he may do voluntarily what might thus be enforced: *Thomas v. Kennedy*, 95 Am. Dec. 740, note 748.

TAX SALE, STRICT COMPLIANCE WITH STATUTE NECESSARY TO VALIDATE: See *Polk v. Rose*, 89 Am. Dec. 773, note 778. A party wishing to rely upon a tax deed as *prima facie* evidence of title must show that the land sold had not been redeemed when the tax deed was executed: *Broughton v. Sherman*, 21 Minn. 433; *Sheehy v. Hinds*, 27 Id. 261; *Williams v. Kirtland*, 13 Wall. 309, all citing the principal case.

MORTGAGEE, AFTER CONDITION BROKEN, CANNOT CONVEY LEGAL TITLE, and his deed, as mortgagee alone, without a transfer of the debt, passes nothing: *Dutton v. Warschauer*, 82 Am. Dec. 765. A conveyance by a mortgagee, unless intended to operate as an assignment of the mortgage, and a transfer of the mortgage debt, is inoperative, and such intention must be made to appear: *Everest v. Ferris*, 16 Minn. 31, citing the principal case. A quitclaim deed, from a purchaser of land at a tax sale, is not such an assignment of the certificate of purchase as to authorize the clerk of the board of supervisors, under the Wisconsin statute, to issue a deed from the county to the grantee in such quitclaim deed: *State v. Wins*, 88 Am. Dec. 689, note 692.

THE PRINCIPAL CASE IS DISTINGUISHED in *Allis v. Goldsmith*, 22 Minn. 126, and in *Madland v. Benland*, 24 Id. 379.

ROBSON v. SWART.

[14 MINNESOTA, 571.]

WAREHOUSEMAN WHO RECEIVES WHEAT ON STORAGE, GIVING MEMORANDA stating that the wheat was No. 2 wheat, is not estopped from showing that the wheat delivered to him was not No. 2 wheat, nor from showing that he is entitled to discharge his contract by returning the same wheat that he received. And a purchaser to whom the owner of the wheat transferred the memoranda, and delivered written orders directing the warehouseman to deliver the wheat to the bearer, has no greater right, as against the warehouseman, than his vendor had.

APPEAL from a judgment entered for the defendant. The opinion states the facts.

Mitchell and Yale, for the appellant.

Berry and Waterman, for the respondents.

By Court, BERRY, J. In this case the court below has found the following conclusions of fact and law, viz.:—

“That during the time from the month of August, A. D. 1866, up to the month of July, A. D. 1867, the defendant, J. G. Swart, was a general warehouseman, engaged, among other things, in receiving grain in store for others for hire, doing business as such warehouseman at Minneiska, in the state of Minnesota; that during the months of September and October, A. D. 1866, one A. P. Foster was the owner of, and delivered to said defendant as such warehouseman, 927 bushels of wheat in store at the warehouse of said defendant in Minneiska; that said defendant received said wheat, and for a valuable consideration agreed to be paid to him by said Foster, agreed to safely store and keep the said wheat in his said warehouse until a return thereof should be demanded by said Foster or his assigns; that said wheat was delivered to said defendant in small quantities from farmers’ wagons; that upon receipt of each load of said wheat said defendant issued to said Foster a memorandum, partly printed and partly written, all in the words and figures following, except date, amount, and name of person delivering the same, and number:—

No. 711.

Account A. P. Foster.

41.25 bushels.....No. 2 wheat.

20 sacks.

DYER.

J. G. SWART.

MINNEISKA, September 29, 1866.

That all of said wheat was placed in a bin and kept by itself, and not mixed with other wheat; that by ‘No 2 wheat’ was meant good, merchantable wheat, weighing not less than 54 pounds to the bushel; that afterwards said Foster sold said wheat to Messrs. Seavey and Langley, and at the time of such sale delivered to said Seavey and Langley said memoranda or receipts; that afterwards said Seavey and Langley sold said wheat to Messrs. Kellogg and Mann, who afterwards sold the same to the plaintiff herein, John Robson; that at each

of such sales said 'memoranda' were transferred and delivered to the purchaser, with a written order from said Foster to said defendant directing said defendant to deliver said amount of wheat to the bearer; that at the time of such purchase by the plaintiff, he had no other knowledge of the amount and quality of wheat purchased than what appeared upon said memoranda; that afterwards, and on the fourteenth day of May, A. D. 1867, said plaintiff, at Minneiska aforesaid, tendered to said defendant said memoranda or receipts, and the defendant's charges for storing said wheat, and demanded a return of said wheat to the plaintiff; that thereupon the defendant tendered to and offered to deliver to the plaintiff the identical wheat delivered to the defendant by said Foster, and for which said memoranda or receipts were given; that the plaintiff refused to receive said wheat; that the wheat so delivered to and stored with defendant by said Foster was not 'No. 2 wheat,' but was wheat of an inferior grade; that at the time of such demand by the plaintiff 'No. 2 wheat' at Minneiska was worth \$2.50 per bushel.

"As a conclusion of law, I find that the defendant has not converted said wheat to his own use; that the plaintiff is not entitled to recover from the defendant the value of said wheat; and that the defendant is entitled to judgment in his favor in this action, and for his costs and disbursements."

We have only to inquire whether the conclusion of law is correct. The memoranda, taken alone, do not express the terms of any contract. They are a part only of the transactions between the original parties, and their significance is only made apparent by the further facts found, showing the circumstances under which, and the purposes for which, they were issued. The contract between Foster and the defendant is not, then, embodied in the memoranda, and it is not from a consideration of them alone that we are to determine the rights and obligations of the parties to this action.

The court below has found, as a conclusion of fact, that Foster was the owner of, and delivered to the defendant, a general warehouseman, 927 bushels of wheat in store, which was of a grade inferior to No. 2; that the defendant received the same, and "agreed to safely store and keep the said wheat in his warehouse until a return thereof should be demanded by said Foster or his assigns."

The contract, then, was to keep and return to Foster or his assigns the identical wheat left in store. Even if the mem-

oranda were formal warehouse receipts, fully expressing the terms upon which the wheat was delivered to and accepted by the defendant, they would not estop the defendant, as against Foster, from showing that the wheat received was really of a grade inferior to No. 2, nor would they bind the defendant to return any other or better wheat than that which he had received. As between the original parties to a bill of lading, the rule is the same; and it proceeds upon the ground that the description of the quantity or quality of the goods received is part of a receipt, and therefore open to explanation. It is not regarded as part of a contract, unless, perhaps, upon express stipulation that it shall be so regarded: 1 Greenl. Ev., 12th ed., sec. 305, and notes; Angell on Carriers, 4th ed., sec. 231, and notes; *Sears v. Wingate*, 3 Allen, 103; *Ellis v. Willard*, 9 N. Y. 529; *Meyer v. Peck*, 28 Id. 590; *Blanchard v. Page*, 8 Gray, 287.

The same rule must apply to these memoranda, for they are certainly nothing more than receipts. As against Foster, then, the defendant, having kept the wheat which Foster had stored with him by itself, so that he was able to return it in specie, and having tendered and offered to deliver the same when it was demanded, is in no default. He has been guilty of no conversion of the wheat, nor of any other act or omission by which he would have made himself liable to Foster had Foster retained his ownership of the wheat. If Foster had not sold the wheat, the defendant, upon making the same tender and offer to him, would be held to have done that which, so far as an action like the present is concerned, is equivalent to the full performance of his contract obligations.

This brings us to the other question in the case. Foster sold the wheat to Seavey and Langley, they to Kellogg and Mann, and Kellogg and Mann to the plaintiff. At each of these sales the memoranda were transferred and delivered to the purchaser, with a written order from Foster directing the defendant to deliver said amount of wheat to the bearer. At the time of his purchase, the plaintiff had no knowledge of the amount or quality of the wheat, except what appeared upon the memoranda.

If the plaintiff only acquired the rights which Foster had, then it is obvious that the defendant, under the facts found, is no more liable to the plaintiff in this action than he would have been to Foster in a similar action, if Foster had remained owner of the wheat. It does not appear that there was any

communication between the plaintiff and defendant prior to or at the time when the plaintiff purchased the wheat, and received the memoranda and accompanying order; so that if he acquired any rights against the defendant greater or other than Foster had, it was solely by virtue of the memoranda,—solely because the defendant, having issued these memoranda, is, as against the plaintiff, estopped by the terms thereof to deny that the wheat he received, and which he was bound to deliver, was No. 2. This is the principal ground upon which the plaintiff relies to maintain this action. To constitute an estoppel *in pais*, there must, among other things, be some admission by word or act upon the truth of which the party who seeks to set up the estoppel has the right to rely: 2 Greenl. Ev., 12th ed., sec. 207; *Hunter v. Trustees Sandy Hill*, 6 Hill, 407.

But in this case, as we have already seen, the “memoranda” do not contain, or profess to contain, the terms of the contract between the defendant and Foster. They contain no representation that the defendant had agreed to deliver to Foster or his assigns No. 2 wheat; and as they neither contain, nor purport to contain, any such representation, they contain nothing upon which the plaintiff had the right to rely for the purpose of estopping the defendant from showing what the real agreement in this respect was. To ascertain what the agreement was, it was necessary for the plaintiff to go outside of the memoranda, and to inquire for the other facts which appear in the finding of the court; and this necessity was patent upon the face of the memoranda themselves, so that, so far from containing a conclusive admission that the defendant was bound to deliver No. 2 wheat, they left the plaintiff to inquire for what purpose they were issued, and what obligations the defendant had assumed in reference to them. They are not analogous to bills of lading, or to regular and formal warehouse receipts, but so far as the point under consideration is concerned, they may more properly be likened to bills of parcels. Of these, it is remarked by Mr. Justice Bigelow, in *Hazard v. Loring*, 10 Cush. 268, that they are “informal documents, . . . not used or designed to embody or set out the terms or conditions of a contract of bargain and sale. They are in the nature of receipts, and are always open to evidence, which proves the real terms upon which the agreement of sale was made between the parties”: See also 1 Greenl. Ev., 12th ed., sec. 805, and notes.

In our opinion, then, the defendant is not estopped by the memoranda from showing what was the grade of the wheat delivered to him, or from showing that he is entitled to discharge his contract by returning the same wheat which he received. The plaintiff, by his purchase of the wheat, and by receiving the memoranda and order, under the circumstances appearing in this case, acquired, as against the defendant, the rights of Foster only. The conclusion of law arrived at by the court below was therefore correct, and the judgment entered thereupon is accordingly affirmed.

WAREHOUSEMAN'S RECEIPT, WHETHER CONCLUSIVE AGAINST HIM ON QUESTION OF QUALITY. — A warehouseman is estopped by his statement and promise, in his receipt for property, to deny that he has the articles mentioned therein, in an action by an assignee or indorsee, who has purchased the paper in good faith: *McNeil v. Hill*, 1 Woolw. 96; *Griscold v. Haven*, 25 N. Y. 595; S. C., 82 Am. Dec. 380. In the latter case, where one member of a firm of warehousemen falsely represented to a person who advanced money on the faith of such representation that he had on storage with the firm a certain quantity of grain, the innocent partners were held bound by such representation and by the firm receipts given by the former, and responsible for the money so advanced. And in the former case, Mr. Justice Miller, in his opinion, referring to the warehouse receipt, said: "If A issues such a paper to B, for articles which he has never received, a third party treating with B on the faith of the statement and promise contained in the receipt will hold A for the goods or their value." And a warehouseman who has given his receipt for a specific number of barrels of flour, or for a specific number of barrels of pork, is estopped from setting up a want of segregation of the goods receipted for from other goods: *Adams v. Gorham*, 6 Cal. 68; *Goodwin v. Scannell*, 6 Id. 541. But it seems that the principle of estoppel does not apply to or govern cases where the description in the receipt does not correspond with the goods which it represents: Schouler on Bailments, 2d ed., sec. 190; 10 Cent. Law J. 422; *Hale v. Milwaukee Dock Co.*, 23 Wis. 276; S. C., 99 Am. Dec. 169; S. C. on second appeal, 29 Wis. 482; and the principal case. On this subject, Schouler says: "Nor has a bill of lading the full character of a negotiable instrument, even though passing by indorsement and delivery; for its receipt or description of goods is *prima facie* only, and does not warrant that the goods are in all respects what the document purports. Neither a carrier nor a warehouseman is to be converted into a guarantor of property and its title for the convenience of customers who employ him, — his position differing greatly from that of the party who gives his bond or note for the payment of a definite sum of money": Schouler on Bailments, sec. 190.

The doctrine of the Wisconsin case is, that the warehouseman is estopped from denying the description of the property in the receipt, so far as it relates to matters which are or ought to be within his knowledge, or that of his agent, but not in respect to matters which are not visible or open to inspection. And this seems to be just and reasonable. Considering the fact that warehousemen's receipts are very generally made negotiable by statute, it would be hazardous to hold that a warehouseman is not estopped by the de-

scription in his receipt, so far as it relates to matters within his knowledge, or which it is his duty to know. On the other hand, it would seem to be too stringent and severe a rule, as against the warehouseman, to hold that he is estopped by the description in his receipt as to matters which are necessarily hidden from him, and which he is under no legal obligation to know. In the case of *Grier v. Nickle*, 1 Am. Law Reg. 119, it was held that no bailee is bound, in giving a receipt for goods, to open the packages to see if they correspond with the name given to them; if he acts in good faith, he is not answerable to another who advanced money on the faith of the receipt, for the reliance was not properly on him, but on the honesty of the person who procured the receipt.

A warehouseman is not a guarantor of the title of property placed in his custody, although his receipts therefor are, by statute, negotiable: *Insurance Co. v. Kiger*, 103 U. S. 352. Although a statute makes bills of lading negotiable by indorsement and delivery, it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue or are intended to result from such negotiation: *Shaw v. Railroad Co.*, 101 Id. 557.

GUILLE v. McNANNY.

[14 MINNESOTA, 520.]

AFFIDAVIT WHICH STATES IN ALTERNATIVE TWO SEPARATE GROUNDS OF ATTACHMENT is bad, and an attachment issued thereon will be set aside. And an affidavit that avers that the defendant "has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, his property, with intent to delay or defraud his creditors," states two separate grounds in the alternative.

APPEAL from an order setting aside an attachment.

G. B. Cooley, for the appellant.

A. J. Edgerton, for the respondent.

By Court, McMILLAN, J. This is an appeal from an order setting aside an attachment against the property of the defendant. The affidavit upon which the attachment was allowed states as the ground of the attachment "that the said defendant has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, his property, with intent to delay or defraud his creditors."

The statute provides that an attachment may be allowed "whenever the plaintiff, his agent or attorney, shall make affidavit . . . that the defendant . . . has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, his property, with intent to delay or defraud his creditors": Sess. Laws 1867, p. 110, c. 76. The affidavit, in stating the ground

of the attachment, it will be perceived, uses the language of the statute just quoted

The only question is, whether the affidavit states several distinct grounds of attachment in the alternative or not. We think it does. The intention of the statute was to protect creditors against the fraudulent conduct of their debtors; but in doing so, it was also intended to protect innocent debtors against oppression and injury by specifying the acts of the debtor which, if done with a fraudulent intention, should be sufficient cause for an attachment in favor of the creditor, and requiring an affidavit of the commission of such acts, or some one or more of them, by the debtor with such fraudulent intent. In the specification made in the statute of the acts which shall authorize the allowance of the writ, they are connected by the disjunctive conjunction "or." So far, then, as the acts specified are distinct and different in their nature, they must be regarded as separate grounds of attachment; but so far as the terms used are descriptive only of different phases of the same fact, they may be considered as prescribing but one substantive ground of attachment: Drake on Attachments, secs. 101, 102. The language used in the statute is, "has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of," etc.

The word "assigned" here means the transfer of the legal title to the property, and perhaps any conveyance of any interest therein; "secreted" means hidden in fact; and "disposed of" signifies any actual removal or disposition in fact of the property other than those before mentioned.

It is true, the creditor may be able in some cases to state positively the existence of one or more of these facts, and when it can be done it would be sufficient; but it is frequently otherwise. If a fraud is intended, it will be perpetrated in the way most likely to avoid detection. A change of possession must always accompany the sale of personal property, and there may be an actual change or removal of the property from the possession of the debtor to a third person, with all the *indicia* of ownership in such third person, without the actual transfer of the legal title, and for the benefit of the debtor. So the property may be removed from one locality to another, and beyond the observation or knowledge of the creditor, and yet neither be secreted nor assigned. In order, therefore, to prevent successful frauds by dishonest debtors, as well as to avoid the doubts which would very frequently meet the consci-

entious creditor in the recovery of his debt, and impair, to a great extent, the efficiency of this remedy if he were compelled to state positively the existence of a single one of the acts specified, or of each one relied upon, we think the intention of the statute was to prescribe, as the ground of attachment, the fraudulent disposition of his property by a debtor, and that the terms "assigned, secreted, or disposed of" are but descriptive of the different modes of performing the act. But there is an essential distinction between having done an act and being about to do it. The debtor charged with fraud has a right to know with reasonable certainty upon what ground the creditor relies in making the charge. If there has been an actual disposition of the property of the debtor by removal or change of its possession, or by secreting it, that is a tangible fact which the creditor must know; and if there has been no such actual disposition, that must be alike palpable and known to him; and if not done, but intended to be done, he must have a knowledge of sufficient facts to enable him so to state in his affidavit, although the precise mode of the intended disposition is not required, but the creditor may state in his affidavit that the defendant is about to assign, secrete, or dispose of his property with intent to delay or defraud his creditors. The affidavit, therefore, states two separate grounds of attachment in the alternative, and for that reason is bad: *Stacy v. Stichton*, 9 Iowa, 400.

Order affirmed.

AFFIDAVIT IN ATTACHMENT, REQUISITES OF: See note to *Fridenberg v. Pierson*, 79 Am. Dec. 165, where this subject is discussed at length.

THE PRINCIPAL CASE IS DISTINGUISHED IN *Brown v. Minneapolis Lumber Co.*, 25 Minn. 461.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

BANK OF COMMERCE v. BOGY.

[44 MISSOURI, 12.]

BILL OF EXCHANGE DRAWN ON DEBTOR does not of itself operate as an assignment in equity of the debt, even if negotiated for a good consideration. It is evidence tending to show such assignment, and, with other circumstances to show that such was the intention of the drawer, will vest in the holder an exclusive claim to the indebtedness.

ORDER FOUNDED ON GOOD CONSIDERATION given for a specific debt or fund, owing by or in the hands of a third person, operates as, or rather is evidence of, an equitable assignment of the demand to the holder, so that he may sue and recover the debt or fund, whether the order be accepted or not.

ANYTHING SHOWING INTENTION ON ONE SIDE to make a present irrevocable transfer of the fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment, if supported by sufficient consideration.

UNACCEPTED BILL OF EXCHANGE DOES NOT of itself give the holder any interest in the fund or property against which it is drawn.

ORDER SHOULD BE TREATED AS EVIDENCE of equitable assignment, when it is given for the exact amount of money in the hands of the drawee upon full consideration, received at the time, with no circumstances indicating any remaining interest in the drawer.

THE opinion states the facts.

Garesche and Mead, for the appellant.

Ewing and Holliday, for the respondent.

By Court, BLISS, J. The petition alleges that the plaintiff is a corporation organized under the laws of Maryland; the National Express and Transportation Company is a corporation of Virginia, to whose stock of one hundred dollars a share

the defendant subscribed for fifty shares, "and then and thereby obligated himself to pay said express company the sum of one hundred dollars per share, or five thousand dollars in all, at such times and in such sums as should be required and ordered by the legally constituted officers of the said express company, and to this end to accept of such drafts as should from time to time be drawn by said express company on defendant for the calls of stock which should be made, and until the sum of one hundred dollars per share has been paid." The petition further alleges that the officers of the company, on the 26th of April, ordered that the share-holders, including defendant, should, on or before the 10th of May, 1866, pay five per cent on each share; and on the 8th of August, 1866, made a further call of five per cent, payable the 25th, making in all five hundred dollars. On the 10th of August, 1866, the express company drew a bill upon defendant, at ten days' sight, for his indebtedness, and for a good consideration negotiated it to the plaintiff, "whereby plaintiff became subrogated in all the rights of the said express company, as the assignee of the said express company, of the indebtedness due to it" by the defendant. The petition alleges presentation of the draft, but acceptance was refused.

Defendant demurs to the petition,—1. Because of the joinder of different causes of action; and 2. Because the facts stated do not constitute a cause of action; alleging a want of allegation of facts sufficient to charge the defendant upon the bill, etc.

There is but one cause of action set out in the petition. The other allegations are intended only as averments necessary to establish a liability upon the bill. But the pleader has evidently drawn his petition upon the hypothesis that a bill upon a debtor for the exact amount of the debt is, *ipso facto*, by operation of law, and without regard to the intention of the parties, an assignment of the debt to the person in whose favor the bill is drawn. The petition alleges the indebtedness by virtue of the subscription to the stock of the express company; the promise to accept drafts for the assessments as they should be made; the drawing and negotiation of the bill to the plaintiff for a good consideration, "whereby plaintiff became subrogated in all the rights of said express company, as the assignee," etc., "of the indebtedness due to it," etc. There is no averment of any assignment to the plaintiff of defendant's indebtedness; no question of fact of intention in that regard is raised, but the legal effect of the bill is relied on. Neither

does the pleader rely upon the previous general promise to accept such draft as should be drawn on him to cover the assessment; for that promise, even if it would be obligatory, is not alleged as made in fact, but is only charged as a legal inference from the subscription. "Plaintiff further avers that defendant subscribed to the capital stock," etc., "and then and thereby obligated himself," etc., "and to this end, to accept," etc.; i. e., the legal effect of his subscription was an obligation to pay for the shares, and to accept drafts for the calls of stock, and no express promise to accept the bill is alleged.

The pleader is mistaken in his view of the law. A bill drawn upon a debtor does not of itself operate as an assignment in equity of the debt, even if it is negotiated for a good consideration. It is evidence tending to show such assignment, and, with other circumstances to show that such was the intention of the drawer, will vest in the holder an exclusive claim to the indebtedness. The question of what constitutes an equitable assignment of a debt or a fund, in connection with an order or draft upon the debtor or holder of the fund, has often been before the courts of the country. There is some difference in the language used by different judges, arising more from the varying circumstances of the several cases than from conflict of opinion. I have found no case where a mere bill, though negotiated for a good consideration, is held of itself, without regard to the intention of the drawer, to operate as an assignment of the debt or fund, or so much thereof as is covered by the bill. Nor have I seen a case where the courts have refused to carry into effect the intention of the parties in relation to such debt or fund. In *Kimball v. Donald*, 20 Mo. 577 [64 Am. Dec. 209], Judge Leonard clearly states the recognized doctrine. "Anything that shows an intention on the one side to make a present irrevocable transfer of the fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment, if supported by a sufficient consideration." The court in that case denied that the bill then under consideration evidenced a transfer of the fund, without reference to the intentions of the drawers; and the case is followed in *Ford v. Angelrodt*, 37 Mo. 50 [88 Am. Dec. 174]. In both cases, circumstances were held to indicate that it was not the intention of the drawer to make such a transfer. In *Dickenson v. Phillips*, 1 Barb. 454, the court, in holding that the transaction under consideration did not amount to an assignment,

recognize the doctrine in saying that "no particular form of words is necessary to constitute an equitable assignment. But there must be evidence of intention to appropriate the fund."

It has always been held that an order founded upon a good consideration, given for a specific debt or fund owing by or in the hands of a third person, operates as, or rather is evidence of, an equitable assignment of the demand to the holder, so that he may sue and recover the debt or fund whether the order be accepted or not: *Walker v. Mauro*, 18 Mo. 564; *Blinn v. Pierce*, 20 Vt. 25; *Edwards v. Daley*, 14 La. Ann. 384; *Rodick v. Gandell*, 1 Atk. 124, 15 Eng. L. & Eq. 22; *Mandeville v. Welch*, 5 Wheat. 277.

But an unaccepted bill of exchange does not of itself give the holder any interest in the fund or property against which it is drawn. In most of the cases cited the bills have been drawn against consignments in the ordinary course of business. *Cowperthwaite v. Sheffield*, 1 Sand. 416,—and on appeal, 3 N. Y. 243,—is a leading modern case. The bills, with others, were drawn in Mobile, against shipments of cotton to Glasgow, were indorsed by defendant, and protested for non-acceptance. The cotton afterward arrived, but the drawers failed, and a contest arose respecting the funds in the hands of the drawee. The court held that the bills gave no specific claim upon the proceeds of the cotton, but treated them as ordinary bills of exchange, binding the drawees only upon acceptance, and not as orders for a specific fund. In *Luff v. Pope*, 5 Hill, 413, and on appeal, 7 Id. 577, a general order or draft was treated as a bill of exchange, and not an order for a specific fund: See also *Marine and Fire Insurance Bank v. Jauncey*, 3 Sand. 257. In none of these cases, nor in the cases cited from our own reports, was there any assignment in fact, nor evidence of present intention to assign to the holder of the bill the fund against which it was drawn.

An order for a specific fund usually contains something to indicate an intention to pass or appropriate the whole fund, as, "Pay to A B \$—, the amount of your collection from C D," or the amount received upon such or such a transaction; or it may not specify the character of the fund. But when the money is in the hands of the drawee, and the order is given for the exact amount, and a full consideration has been received for it,—especially if advanced at the time, with no circumstances indicating any remaining interest in the

drawer,—the order should be treated as evidence of an equitable assignment.

In *Mandeville v. Welch*, 5 Wheat. 277, Judge Story makes the amount of the order—the fact that it is or is not drawn for the whole of a particular fund—a test of the obligation of the debtor to accept it. Upon an issue upon the fact of the assignment, involving the intention of the drawer and holder of the bill, consideration, etc., facts may transpire that would relieve the case from all embarrassment. But if it should merely appear that the bill was drawn in the usual course of business, was cashed by the holder, or received as security for or in satisfaction of an existing debt, and that it covered the precise amount already due the drawer from the drawee, we are not now called upon to say what effect should be given such a state of facts,—whether the paper should be treated as an ordinary bill of exchange, or as an order for a specific fund, losing its character as a bill.

Though we find no error in sustaining the demurrer, yet, that the issue may be raised as indicated, the judgment will be reversed at the costs of the appellant, and the cause remanded.

The other judges concurred.

BILL OF EXCHANGE, THOUGH NEGOTIATED, is not an equitable assignment of the fund upon which it was drawn, if upon presentment it was refused payment: *Ford v. Angelrodt*, 88 Am. Dec. 174, and note 178.

ORDER FOR FULL AMOUNT OF FUND, founded on good consideration, is an equitable assignment thereof: *Wheatley v. Strobe*, 73 Am. Dec. 522, and note 526; *Boyer v. Hamilton*, 21 Mo. App. 524, citing the principal case.

MERE DRAWING AND DELIVERY OF BILL OF EXCHANGE is not a transfer of the debt due the drawer by the drawee: *Bank of Commerce v. Bogy*, 9 Mo. App. 337, citing the principal case. And if it is dishonored, the drawee is not liable in equity: *Harrison v. Wright*, 100 Ind. 525, citing the principal case.

WHERE THERE IS CLEAR INTENTION between the parties to assign a fund, equity will give effect to the assignment: *Lutty v. Woods*, 6 Mo. App. 72, citing the principal case.

ARNOT v. ALEXANDER.

[44 MISSOURI, 25.]

EQUITY WILL HEAR EVIDENCE, FIX AMOUNT OF RENT, and decree specific performance, or hold the covenantor liable in damages for the breach of his covenant to renew a lease, providing that the amount of rent for the renewal is to be ascertained by what responsible parties would agree to pay for the use of the premises, as that fixes the rent with as much certainty as though it were to be determined by appraisers, and only means the highest market value of the premises at the time of renewal or valuation.

WHERE COVENANT FOR RENEWAL OF LEASE provides that the lease shall be renewed if the parties can agree upon terms, or if the lessee is willing to give as much as any other responsible party will agree to give, the lessee may elect whether he will take damages at law, or have specific performance in equity.

THE opinion contains the facts.

Rankin and Hayden, for the appellant.

Cline, Jamison, and Day, for the respondents.

By Court, CURRIER, J. This is a petition in the nature of a bill in equity, praying for the specific execution, on the part of the defendant, of his covenant to renew a lease. The covenant is in these words: "If this lease shall not be terminated by forfeiture or any other cause before the expiration of the five years, then said lessee or his legal assigns shall be entitled to a renewal of the same for five years longer, provided said parties can agree upon terms, or that said lessee is willing to give as much as any other responsible party will agree to give."

The conditions upon which this covenant for renewal was to be executed have been complied with, and it is not insisted that its non-execution would not be injurious to the plaintiffs. The case would therefore seem to fall within the jurisdiction of chancery, and warrant a decree for a specific performance of the covenant on the part of the lessor. But it is insisted on the part of the defendant that the covenant is vague and uncertain; that equity will not give certainty and definiteness to an obligation which the parties have left uncertain and indefinite; that it is only where the terms of a covenant for renewal are express and unequivocal that specific performance will be enforced in chancery. The uncertainty and indefiniteness complained of, upon which the defense is rested, are supposed to attach to the provision respecting the *quantum* of rent to be reserved for the renewal term of the lease. The provision

itself is express and unequivocal, although it fails to fix a specific amount of rent. That was to be determined by what other responsible parties would "agree to give" at the expiration of the first term of five years. The amount of rent thus to be reserved is no more uncertain or indefinite than it is in all that class of cases where the amount of rent for the renewal terms is left to be determined by the valuation of third parties. In these cases, it is not denied that the covenant for renewal is sufficiently definite, express, and unequivocal to justify their enforcement in chancery. The court, in such cases, will hear evidence and fix the amount of rent, and decree specific performance, or hold the covenantor liable in damages for the breach of his covenant: *Hall v. Warren*, 9 Ves. 605; *Blackmore v. Boardman*, 28 Mo. 420; *Finney v. Cist*, 34 Id. 303 [84 Am. Dec. 82]; *Garnhart v. Finney*, 40 Id. 449; 2 Story's Eq. Jur., secs. 722, 751. Leaving the amount of rent for the renewal term of the lease to be ascertained by what responsible parties would agree to pay for the use of the premises fixes the rent with as much certainty as though it were to be determined by a board of appraisers to be selected by the parties to the lease, each selecting one, with authority in these to select a third in case the two should disagree. The standard of valuation would be the same in both cases, to wit, the rentable market value of the premises at the time the valuation should be made. If the court may hear evidence, and ascertain for itself the value when the appraisement fails through a refusal to appoint an appraiser, why may it not hear evidence and decide the value when the appraisement fails from some other cause? The whole supposed difficulty rests upon the idea that what "responsible parties will agree to give" for the use of rentable business property is different from and may be "something more" than its full or highest rentable market value. This view of the subject we conceive to be erroneous. For whose benefit and to what end was this clause of renewal introduced into the deed of lease? Evidently it was intended for the benefit of the lessee, and may be supposed to have formed an inducement to the original renting. If the condition to the renewal included the payment by the lessee of anything more than the highest rentable market value of the leased premises, of what advantage could it be to him? Such a construction of the clause defeats the evident purpose and understanding of the parties, as that purpose and understanding is gathered from the language they employ. The lessee,

instead of being put to a disadvantage in the general competition, was to be a favored party. By the terms of the contract, he was to have the preference over other responsible bidders, and the irresponsible were excluded from the circle of competition. The amount of rent, therefore, was to be determined from the competition that might arise between exclusively responsible bidders in a fair and open market,—that is, by the market value of the premises at the time of renewal.

It is to be presumed that the parties contracted with reference to fair, reasonable, and practical results, and the language employed by them should have a fair, reasonable, and practical construction. While equity does not make contracts for parties, it gives construction to contracts which parties make for themselves, and therein employs the same rules of interpretation which prevail in courts of law. No forced construction which calculates remote chances and possibilities, and which tends rather to defeat than give effect to the real purposes of the contract, will be resorted to in order to turn an injured party over to inadequate legal remedies. It is against good conscience that the lessor in this case should be allowed a right of election whether he will honestly perform his covenant, or simply pay damages for a breach of it; but it is in every way reasonable and just that the lessee should elect his remedy, and either take damages at law or have a specific performance in equity: 2 Story's Eq. Jur., sec. 717 a. The case presents no insuperable difficulty in the way of this just result being reached. With the concurrence of the other judges, the judgment of the court below is affirmed.

THE PRINCIPAL CASE IS CITED in *Coles v. Peck*, 96 Ind. 342, where it is held that when the lease provided for the erection of a building on the demised premises during the term, and that at the end thereof the lessor could elect to renew the lease or buy the building, or sell the lot at an appraised figure if the lessor fail to elect, the lessee may maintain an action against him for equitable relief: See also 1 Taylor on Landlord and Tenant, 8th ed., sec. 339, citing the principal case.

SOUTHWESTERN FREIGHT AND COTTON PRESS COMPANY v. STANARD.

[44 MISSOURI, 71.]

EVIDENCE INTRODUCED TO ESTABLISH GENERAL CUSTOM, but which consists of individual opinions, and the obligation which the witnesses should have deemed resting upon them under the circumstances in the case, is inadmissible.

CUSTOM MUST BE GENERAL, uniform, certain, and notorious, and to be binding on the parties must be directly known to them, or so general and universal in its character that knowledge may well be presumed.

WHERE CONTRACT IS MADE AS TO MATTER ABOUT WHICH THERE IS CUSTOM well established, such custom is understood as forming part of the former, and may always be referred to for the purpose of showing the intention of the parties in all particulars not expressed in the contract.

EVIDENCE OF CUSTOM IS NEVER ADMISSIBLE to oppose or alter a general principle or rule, or to make the rights and liabilities of parties other than they are at law.

AS BETWEEN SELLER AND BUYER, if anything remains to be done before the goods are to be delivered, a present right of property does not attach in the buyer. But separation is enough to pass the property, though weighing, measuring, or counting may afterwards be necessary to adjust and determine the final amount of the price.

WHEN NOTHING IS SAID, AND NO TIME STIPULATED AS TO PAYMENT, sale is understood to be for cash, and the payment and delivery are concurrent acts, and the vendor may refuse to deliver without payment; and if payment is not made immediately, the sale becomes void.

IN CASE OF SALE WHERE TITLE HAS PASSED, and the goods have been constructively delivered, possession cannot be coerced until payment is made, for as long as the vendor retains and has not surrendered possession, his lien exists; and though there may be a delivery which will pass the title, it will not necessarily destroy the lien.

UNLESS CREDIT IN SALE IS EXPRESSLY GIVEN, which is a waiver of any right to demand immediate payment, the vendor's lien continues to exist; and if the buyer is insolvent when he demands delivery, the seller may refuse to deliver, even when credit has been given.

IN DOUBTFUL CASES OF SALE, QUESTION OF DELIVERY and acceptance is for the jury under proper instructions. But where the facts are clear and undisputed, that question, and what will amount to a waiver of the vendor's lien, is for the court.

THE opinion states the facts.

Jones and Anderson, and Dryden and Lindley, for the appellant.

Slayback and Spencer, and Whittelsey, for the respondent.

By Court, **WAGNER, J.** Plaintiff brought its action against the defendant for the conversion of two hundred barrels of flour. The defendant was the owner of a steam flouring mill in the city of St. Louis; and in the latter part of September,

1867, he was at the Merchants' Exchange, and entered into an agreement with Lamb and Quinlin, then merchants of that city, to sell them two hundred barrels of flour, of the brand "Eagle Steam," at the price of thirteen dollars per barrel. The flour had to be made ready for delivery, and a day was fixed on which it was to be delivered, which was a few days subsequent to the agreement of sale. On the first day of October, the parties again met, when the defendant gave to Lamb and Quinlin, the purchasers, an order written on a card, which is in the words and figures following, viz.: "Eagle Mills, deliver to Lamb and Quinlin two hundred barrels Eagle Steam flour. St. Louis, October 1, 1867. E. O. Stanard."

Nothing was said at the time the agreement was entered into, or when the order was given, as to when payment should be made. There had been frequent previous dealings between the parties, and credit had been extended on purchases of flour for a few days; but these credits were mere voluntary courtesies, and the dealings were considered as cash transactions. On the same day that the order was given, Lamb and Quinlin sold and transferred the order to the plaintiff, and received a bill of lading for the flour for transshipment to New York. Upon this, plaintiff indorsed their draft for two thousand two hundred dollars, which, after being protested, it eventually had to pay.

On the evening of the day on which the order was given and transferred, plaintiff demanded the delivery of the flour; but defendant's agent, in charge of his mill, and acting by his direction and commands, refused to deliver the same, on account of Lamb and Quinlin's insolvency. On the facts as substantially detailed above, the circuit court declared that the plaintiff was not entitled to recover. In consequence of this declaration, the plaintiff took a nonsuit, and after an unavailing motion to have the same set aside, the cause is brought into this court by appeal.

A large mass of evidence was introduced to show a custom among the merchants that the effect of the order was to vest the title to the flour in the purchasers, and that from the time the card was handed over to them, they became the absolute owners, and that the transference of the same to the plaintiff divested the defendant of all interest.

But this branch of the case was not made out; there was great diversity among the witnesses as to the force and mean-

ing of the supposed custom, and so far from tending to establish any open, uniform, and notorious rule, the most of the witnesses restricted themselves to declaring what their individual opinions were, and the obligations they should have deemed resting upon them had they been placed in the defendant's situation. This, of course, was all illegal, and should have been excluded.

A custom, to be good, must be general, uniform, certain, and notorious; and to be binding on parties to a transaction, must be directly known to them, or so universal and general in its character that knowledge may well be presumed. Where a contract is made as to a matter about which there is a custom well established, such custom is to be understood as forming a part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract. But evidence of custom, however, is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law. What constituted a delivery of the flour was a question of law; and the rights and liabilities of the vendor or vendee must be ascertained and fixed by the same standard.

It is insisted that the seller, by making and delivering the order to Lamb and Quinlin, clothed them with a title, and enabled them to get credit with the plaintiff, and that therefore he should be held estopped from setting up any adverse claim, or averring anything to plaintiff's disadvantage. A conclusive answer to this is, that the order was not a negotiable instrument, and the assignors were incapable of transferring to their assignee any greater or different right than they possessed.

The sale was for two hundred barrels of flour at the mills; no particular flour was designated, nor does it appear that it was ever set apart or identified. Whether it was all on hand, or formed part of a larger lot, unseparated and undistinguished, is nowhere shown in the case. If anything remains to be done, as between the seller and buyer, before the goods are to be delivered, a present right of property does not attach in the buyer. This is the universally recognized principle in the doctrine of sales: 2 Kent's Com., 11th ed., 664; *Hening v. Powell*, 33 Mo. 468; *Hanson v. Meyer*, 6 East, 614; *Simmons v. Swift*, 5 Barn. & C. 857; *McDonald v. Hewett*, 15 Johns. 349 [8 Am. Dec. 241]; *Scudder v. Worster*, 11 Cush. 573; *Hutchin-*

son v. *Hunter*, 7 Pa. St. 140; *Field v. Moore*, Hill & Den. Sup. 48. But separation is enough to pass the property, though weighing, measuring, or counting may afterward be necessary to adjust and determine the final amount of the price: *Cunningham v. Ashbrook*, 20 Mo. 533; *Bass v. Walsh*, 39 Id. 192; *Macomber v. Parker*, 13 Pick. 183.

The whole case shows that there was nothing said between the parties as to payment; and where no time is stipulated for payment, it is understood to be a cash sale, and the payment and delivery are immediate and concurrent acts, and the vendor may refuse to deliver without payment; and if the payment be not immediately made, the contract becomes void: *Outwater v. Dodge*, 7 Cow. 85; *Woods v. Magee*, 7 Ohio, 128 [30 Am. Dec. 202]; *Levan v. Smith*, 1 Denio, 571; Com. Dig., tit. Agreement, B, 3; *Palmer v. Head*, 13 Johns. 434; *Harris v. Smith*, 3 Serg. & R. 20; *Bainbridge v. Caldwell*, 4 Dana, 213; *Ferguson v. Clifford*, 37 N. H. 86; *Morris v. Rexford*, 18 N. Y. 552; 2 Kent's Com. 665.

Had the title passed and the flour been constructively delivered, possession could not have been coerced till payment was made. The vendor had not surrendered possession, and while he retained the same his lien existed; and although there may be a delivery which will pass the title, it will not necessarily destroy the lien: Story on Sales, sec. 290; *Arnold v. Delano*, 4 Cush. 38 [50 Am. Dec. 754]; *Sigerson v. Kahmann*, 39 Mo. 206.

Unless credit is expressly given, which is a waiver of any right to demand immediate payment, the lien will continue to exist. So, also, if the buyer be insolvent when he demands delivery, the seller may refuse to deliver even when credit has been given: *Reader v. Knatchball*, 5 Term Rep. 218, note. It has been held, further, that where payment for the goods sold is to be made upon delivery, in the notes of a third party, who becomes insolvent between the time of the contract and the period fixed for delivery, the seller is not bound to deliver upon a tender of such notes, though they be not entirely worthless: *Roget v. Merritt*, 2 Caines, 117; *Benedict v. Field*, 16 N. Y. 595.

In *Gill v. Pavenstedt*, 7 Am. Law Reg., N. S., 672, A purchased goods warehoused in a bonded warehouse from the importer B, in whose name they were entered. The goods were bought on credit at a specified price, and the duties were to be paid by A as a part of the price. He had withdrawn, by

permission of B, parcels of goods at different times, paying the duties on such parcels. Before the credit had expired, B gave to A an order on the bonded warehouseman to transfer the residue of the goods to A's name, which was accordingly done. As between the parties and the government, the goods still remained in B's name. They could only be withdrawn under the regulations of the treasury department, by a "withdrawal entry," signed by B, or by some one authorized by him in writing. While the goods were in this condition, the purchaser, A, became insolvent. He demanded that B should sign the necessary withdrawal entry, which the latter refused to do, except upon full payment of the price. And it was held that an act remained to be done, as between buyer and seller, of such a nature that there was no delivery, either actual or constructive, and that B had a right of detention of the goods for the unpaid purchase-money.

It is clear, upon principle, reason, and authority, that the seller in the present case could not be compelled to part with his property till payment was made or tendered. But it is objected that the court erred in withdrawing the case from the jury. In doubtful cases the question of delivery and acceptance is for the jury, under proper instructions of the court. But where the facts are clear and undisputed, what will amount to delivery and acceptance, or waiver or destruction of lien, must be determined by the court. Here there is no contest about the facts; they are few, plain, and simple, and I am unable to perceive that the court committed any error.

Judgment affirmed.

BLISS, J., concurred.

CURRIER, J., did not sit.

CUSTOM, TO BE BINDING ON PARTIES, must be general and uniform, peaceably acquiesced in, known to the parties, or so old that knowledge is presumed: *Steele v. McTyler's Adm'r*, 70 Am. Dec. 516, and note 523; *Strong v. Grand Trunk R. R. Co.*, 93 Id. 184. It must also be reasonable: *Farnsworth v. Hemmer*, 79 Id. 756.

REASONABLE CUSTOM WILL BE CONSIDERED in construing a contract presumed to have been made with reference to it: *Leach v. Perkins*, 35 Am. Dec. 268; *Inglebright v. Hammond*, 53 Id. 430; *Cox v. O'Riley*, 58 Id. 633, and notes to these cases; also note to *Farnsworth v. Hemmer*, 79 Id. 759.

EVIDENCE OF CUSTOM, EFFECT OF WHICH is to control rules of law or change the terms of a contract, is inadmissible: *Boon & Co. v. Steamboat Belfast*, 88 Am. Dec. 761, and note 765; *Dickinson v. Gay*, 83 Id. 656, and note 664; *Boardman v. Spooner*, 90 Id. 196.

CUSTOM TO ENTER INTO AND EFFECT the construction of a contract must be either directly known to the parties, or else so general in its character that knowledge of it may well be presumed: *Park v. Viernon*, 16 Mo. App. 335. Where the subject-matter is certain, and the terms used are not doubtful, evidence of the custom is not admissible to alter the contract; it is only admissible to show intention as to things not expressed in the contract, or which are unusual or technical: *Kimball v. Browner*, 47 Mo. 400, both citing the principal case. But a custom, however well established, is not permitted to make the rights and liabilities of the parties other than they are at law: *Ober v. Carson*, 62 Id. 214, also citing the principal case.

SALE IS EXECUTORY, AND TITLE DOES NOT PASS so long as anything remains to be done between the buyer and seller, as counting, weighing, or measuring: *Cleveland v. Williams*, 94 Am. Dec. 274, and note 281; *Nicholson v. Taylor*, 72 Id. 728, and note 730.

QUESTIONS OF VENDOR'S LIEN, AND WAIVER OF, in case of sale on credit, or without it, are considered and decided in consonance with the views expressed in the case here reported, in *Arnold v. Delano*, 50 Am. Dec. 754, and note 760; see also *Merchants' etc. Bank v. Hewitt*, 66 Id. 49; *Hall v. Richardson*, 77 Id. 303.

QUESTION OF DELIVERY IS FOR JURY: *Atwell v. Miller*, 61 Am. Dec. 294, and note 299.

WHERE NOTHING IS SAID AT TIME OF SALE about payment, it is presumed that it is for cash; payment and delivery are immediate and concurrent acts in such case, and the vendor has the right to refuse to deliver without payment. Although counting and separation amount to constructive delivery, vesting title in the vendee, still actual delivery and change of possession cannot be required until payment. Though such delivery will pass the title, retention of actual possession preserves the lien: *Southwestern Freight etc. Co. v. Plant*, 45 Mo. 519, citing the principal case.

IN SALE, IF NO TIME IS AGREED UPON FOR PAYMENT, it must be made in a reasonable time: *Matthews v. McElroy*, 79 Mo. 204, citing the principal case.

WADDINGHAM'S EXECUTORS v. LOKER.

[44 MISSOURI, 182.]

PARTY CANNOT WITHDRAW HIS PROPERTY FROM HIS CREDITORS, nor can he, if he owes debts, devote his capital, industry, or credit to the accumulation of property to be held by some third person, for his own use or that of his family, to the exclusion of his creditors. In such cases the law intervenes and goes behind the fraudulent and secret transaction, and subjects the property or trust funds to the payment of just and legal demands.

PROPERTY NOT SUBJECT TO CREDITOR'S DEMANDS. — At the request of A, an insolvent, B bought stocks for the benefit of the wife and family of A. The latter had no control over the investment, none of his money was in it, nor did B look to him for remuneration in case it should prove unprofitable afterwards. B conveyed the stock to the beneficiaries, and it was held that it could not be subjected to the payment of the debts of A.

WHEN EXAMINING QUESTIONS OF FRAUD, courts will look into all the circumstances, and while express and positive proof is not required, yet mere suspicion, leading to no certain results, will not establish fraud.

THE opinion contains the facts.

Cline, Jamison, and Day, for the appellants.

Gantt, for the respondents.

By Court, WAGNER, J. Plaintiffs filed their petition in the circuit court, the general object and purpose of which was to subject certain stocks held by the widow and daughters of George W. Jencks to the payment of debts owing by him. The petition set out and described a judgment rendered in favor of Waddingham against Jencks while both were living, a revival of that judgment, partial payments, and the death of both parties; and proceeded to state, as ground of relief and for equitable interposition, that the stock in question had been originally purchased with the money and means of Jencks, and given to his wife and daughter, in fraud of the rights of his creditors.

The answer denied that the stock was in any manner, or in any sense or degree, purchased or acquired by the means or credit of Jencks. It sets forth the whole history of the purchase of the stock and the circumstances attending it. It states that when the transfer company was formed, the stock of which is in controversy in this suit, Jencks was an employee of the Ohio and Mississippi Railroad Company; that he suggested to the defendant, Loker, who was an old and intimate friend, that the stock of the company afforded an excellent opportunity for good investment, and that it could not fail to be profitable; that Jencks urged Loker to subscribe on his own account to the stock, and also urged him to take a number of shares for the benefit of the wife and daughters of Jencks, assuring him that in his judgment the only money he would have to pay on account of the subscription for the wife and daughters of Jencks would be the first installment, that the dividends would speedily pay off the residue of the subscription and make the stock good, and refund to Loker the money he was requested to advance. The proposition was to make the last subscription in the name of "Geo. H. Loker, trustee"; to hold the stock in his own name, as security, until he was fully reimbursed, and then to transfer it to the wife and daughters of Jencks. Loker was a banker and possessed of wealth, and was about using his means for the improvement

of his real estate, and he regarded Jencks's proposals as visionary, and refused to accede to them. Jencks was wholly insolvent, and supported his family on a salary which he received from the railroad company. At last, owing to the importunity of Jencks, and his evident distress at the penniless condition in which his family would be placed in the event of his death, Loker, on account of personal friendship, was induced to take the risk of making a subscription in his own name, as trustee, and to advance the cash payment; if the adventure was unsuccessful, to sell with as little loss as possible; and if Jencks's anticipations were realized, then, after paying himself and ten per cent interest, to transfer the stock to Mrs. Jencks and her daughters. He subscribed accordingly for fifty shares, nominally valued at five thousand dollars, and advanced in cash, as a first payment, two thousand dollars. The stock proved extraordinarily remunerative. The dividends first canceled Loker's stock note for the deferred payment, then reimbursed him his cash installment and interest, and continued so profitable that the company expanded the stock, and what was originally fifty shares grew into five hundred, and still continued to pay handsome dividends. In process of time the two daughters of Jencks were married, and Loker thereupon conveyed two hundred of the shares to each of the daughters respectively, and the remaining one hundred shares to Mrs. Jencks, the widow. At the hearing in the court below, the bill was dismissed as containing no equity, and the plaintiffs have appealed. A large mass of evidence was introduced, and after a careful perusal of it, I must say that the transaction, as narrated in the answer, seems to be well sustained by the proofs. It is a rule well known and established, that the law will not permit a man to withdraw his property from his creditors. Justice must prevail before generosity. Nor can a man owing debts be permitted to devote his capital, industry, or credit to the accumulation of property to be held by some third person, for his own use or that of his family, to the exclusion of his creditors. In all such cases the law intervenes and goes behind the fraudulent and secret transactions, and subjects the property or trust funds to the payment of just and legal demands. Did the evidence show that Jencks merely applied to Loker to subscribe for the stock, for the purpose of having it placed in his name, as a cover for fraud, while Jencks furnished the money to pay for the same, and retained a secret use, there would be no difficulty in reach-

ing the stock, and making it liable for Jencks's debts. But the testimony of Loker is decisive, and stands uncontradicted, — that the stock was not procured either with the money or credit of Jencks. It plainly appears that Jencks had no ownership in it; nor had he any control over it, only so far as Loker chose to invest him with that control. Jencks did attend the meetings of the board of directors, and attended to the management of the stock; but it was because he was lawfully authorized thereto by written power of attorney from Loker, and afterward as the duly accredited agent of his daughters. No creditor of Jencks suffered to the amount of a farthing in consequence of the purchase of the stock; for neither his money, credit, nor labor contributed in the slightest degree toward its acquisition.

It is not shown that Jencks made any promise to Loker to be responsible or to reimburse him, and it is unquestionably evident that Loker did not act from any notion of Jencks's responsibility, for Jencks was a ruined man, hopelessly insolvent, and barely able to make a subsistence for his family. That his views were consulted, and to a certain extent deferred to, may be admitted; but they were only advisory, and had no binding effect upon Loker. The assumption that he assumed ownership of the stock, and had absolute power over and could require Loker to make such disposition of it as he desired, is unfounded; for Loker states emphatically that had Jencks applied to have the stock transferred to him, he would not have complied with the request, and that in the distribution that was made of the stock Jencks had no hand in the matter, but that it was exclusively his own work. The subscription of the stock by Loker was purely voluntary, made from generous motives, as an act of friendship; and had the adventure miscarried or proved unsuccessful, he would have had no legal recourse on Jencks to make good his loss. So, after it was a success, and turned out to be an almost unexampled speculation, when we take into account the smallness of the investment, had Loker seen proper to hold on to the stock as his private property, there is nothing disclosed which would have prevented him from doing so. No consideration had passed to him, and there was nothing on which to base a legal obligation. It is apparent that he was bound in the forum of conscience, but the law does not enforce mere moral or ethical duties. Had he suffered his avarice to override his acts of generosity, and committed such a wrong, he would have branded himself as a

dishonored and dishonest man, but it could hardly be said that he would have incurred any legal liability. Perhaps he deserves no credit for acting honestly, but it would be a great and grievous wrong to turn his bounty from its just and rightful recipients, and place it in the hands of strangers. There is nothing in the case which in the least militates against or impairs the view here taken.

The acts of Jencks in examining the books and watching the general management of the stock are entirely consistent with his character of agent and attorney. Much stress is laid upon the fact of his depositing large sums of money, which it is argued arose out of dividends, and that he used this money as his own. How he used this money I do not know, nor does the record enable me to form an opinion. It is shown that the deposits were made in his name as agent, and if he did use it, I am unable to see that the plaintiffs had any particular concern in it. Loker and the beneficiaries of the stock might have complained, but if they made no objection the plaintiffs could not do it for them.

It is also contended that the stock ought to be subjected to the payment of the debt by virtue of the doctrine of powers; that where a debtor, having a general power to appoint property which he never owned, exercises that power in favor of volunteers, the property in the hands of such volunteers is burdened with the debts of the appointer if it be necessary for the satisfaction of them. But here it does not appear that Jencks had any power of appointment; the evidence is expressly to the contrary. In the examination of questions of fraud, courts will look into all the circumstances; and while express and positive proof is not required, yet mere suspicion, leading to no certain results, will not be deemed sufficient ground to establish fraud. If there was anything to impugn or impeach the fairness of the transaction, the evidence most signally fails to show it. After a review of the whole case, I have not seen anything that did not consist with perfect fairness and honesty.

Judgment affirmed.

The other judges concurred.

VOLUNTARY CONVEYANCE IS VOID AS AGAINST CREDITORS where the grantor settles his property in trust for his own use for life, and then for the use of his appointees: *Mackason's Appeal*, 82 Am. Dec. 517, and note 520.

INSOLVENT DEBTOR WILL NOT BE ALLOWED to dispose of his property so as to defraud his creditors, but the wife will always be protected in the honest enjoyment of her property: *McLaran v. Mead*, 48 Mo. 124; *Cooper v. Ham*, 49 Ind. 404, both citing the principal case.

PROOF OF FRAUD FROM CIRCUMSTANTIAL EVIDENCE: Note to *Burch v. Smith*, 65 Am. Dec. 157-162; *Linn v. Wright*, 70 Id. 232, 291; *Booth v. Bunce*, 83 Id. 372.

STATE v. KUPFERLE.

[44 MISSOURI, 154.]

INFORMATION IN NATURE OF QUO WARRANTO is essentially a civil proceeding, and the burden of proof is upon the complaining party to show that his adversary is illegally in possession of the office.

EVERY REASONABLE INTENDMENT IS MADE in favor of the acts of a private corporation. They are presumed regular until the contrary appears.

PARTY IN POSSESSION OF OFFICE IN PRIVATE CORPORATION is presumed regularly elected, and entitled to hold until the contrary is shown.

PROCEEDINGS OF BOARD OF DE FACTO DIRECTORS OF PRIVATE CORPORATION are presumed regular until irregularity is shown; therefore, when, acting under a by-law, they remove an officer, it will be presumed that they acted on sufficient grounds, until their action is impeached by proof.

THE opinion states the facts.

Dryden, and Lindley and Kinealy, for the relator.

Finkelburg and Rassieur, for the respondent.

By Court, CURRIER, J. This is an information in the nature of a writ of *quo warranto*, the writ itself having long since fallen into obsolescence and disuse. The information initiates a civil proceeding to try the right to an office, although in its origin and form it partakes of a criminal character, and is a substitute for the original writ of *quo warranto*. But the proceeding is essentially civil, and that is the established doctrine in this state: *State ex rel. Brison v. Lingo*, 26 Mo. 496; *State ex rel. McIlhany v. Stewart*, 32 Id. 379; *State ex rel. Hequembourg v. Lawrence*, 38 Id. 535. The information, answer, and reply are subject to the rules governing corresponding pleadings in strictly civil causes,—the information, in this regard, answering to the petition in civil suits. The question whether, in a given suit, the *onus* of proof is shifted from the complaining party to his antagonist, must be determined upon an examination of the pleadings, and not by reference to the form and history of an obsolete writ.

Apply these principles to the pleadings in the present suit.

The relator initiates the proceeding, and alleges in the information that he was duly appointed secretary of the German Insurance Company, and assumed the duties of that office; that on the second day of June, 1868, a minority of the board of directors of the insurance company held an illegal meeting, assuming to be a quorum, and without warrant of law appointed two associate directors, who thereupon assumed to act as such directors; that the board thus composed, illegally and without notice to the lawful secretary, in violation of the by-laws of the company, removed that officer and declared the office of secretary vacant, and thereupon appointed the respondent to fill the vacancy; that the respondent, without any legal appointment or authority, assumed the place, and unlawfully continues therein, excluding the relator — the legal secretary — therefrom. This is the substance of the information, although it contains various other recitals and averments, and sets out in full certain by-laws which are supposed to have been violated by the proceedings complained of.

The answer denies the material averments of the information, and then proceeds to allege affirmatively a state of facts substantially negating the allegations of the information, and asserting the entire regularity and lawfulness of the proceeding of the directors in declaring the office of secretary vacant, and in the appointment of the respondent thereto. The relator replies, denying the affirmative allegations of the answer.

In that state of the pleadings, on whom is the burden of proof? That is the material question in the case. Aside from an admission on the part of the respondent that the relator was legally in office prior to the second day of June, 1868, and until the office was declared vacant on that day, neither party introduced any testimony at the hearing, — each claiming that the burden of proof was on the other. The court held that the *onus* was upon the relator, and gave judgment accordingly.

This is a civil proceeding, as already shown; and unless it is to be taken out of the category of other civil causes, in respect to the form and methods of trial, the judgment of the circuit court was clearly right.

The answer denies everything, and the legal presumptions are all against the relator, and yet it is claimed that the affirmative is on his adversary. We hold differently. Every reasonable intendment is to be made in favor of the regu-

larity of the proceedings complained of. They were the acts of a private corporation, and are to be presumed regular until the contrary appears: *McDaniels v. Flower B. M. Co.*, 22 Vt. 274. It is alleged that two of the parties who acted were illegally put upon the board of directors. But they acted as directors notwithstanding, and were directors *de facto*: Angell and Ames on Corporations, sec. 759. In *State ex rel. Danforth v. Hunton*, 28 Vt. 594, which was a *quo warranto* proceeding, it was held that although the form of the issue required the defendants to show cause, and would therefore seem to indicate that the defendants should go forward, still the *onus* was on the relators; that the form of the issue did not correctly define the true position of the parties in regard to the presumptions of right. The court said: "The defendants are in possession of the office in question, and should be presumed regularly elected and entitled to hold until the contrary be shown. The plaintiffs, then, are bound to make a case against them, and they should go forward in the proof and in the argument." This puts the matter on clear and reasonable ground, and there is nothing in our statute to require a different and less reasonable practice. The New York court of appeals, in a late case, held the same doctrine announced in the case from Vermont: See *People v. Lacoste*, 37 N. Y. 192; *State v. Brown*, 34 Miss. 688.

This view of the subject substantially disposes of the motion in arrest. The proceedings of the board of *de facto* directors are to be presumed regular until irregularity is shown. They are not to be presumed irregular. The twenty-second by-law, set out in the information, provides that "officers, except the president and vice-president, shall hold their offices until removed by the majority of the board of directors on a charge of disability, violation of duty, or any other sufficient cause." Under this rule the secretary was removable when the directors should consider there was sufficient cause for it, and they were the judges of the sufficiency of the cause. No formal notice of charges or trial was requisite. A majority of the *de facto* board of directors considered that a sufficient cause of removal had arisen, and accordingly removed the secretary, as the information shows, and put another man in his place. Until their action is impeached by proof, it is to be presumed that they acted on sufficient grounds.

Let the judgment be affirmed.

The other judges concurred.

BURDEN OF PROOF IN QUO WARRANTO. — *Quo Warranto Proceedings* differ from ordinary civil actions in respect to the burden of proof; for while in the latter the affirmative of the issue is maintained by the plaintiff, in a *quo warranto* proceeding the initial burden of proof rests upon the defendant, and he must disclose and prove his title to the office or franchise in controversy. In *Rez v. Leigh*, Burr. 2143, Lord Mansfield observed that in civil cases, if the plaintiff has no cause of action he cannot have judgment. But in *quo warranto*, he said, the rule is quite different. For if the defendant has usurped a franchise without a title, the king must have judgment. The defendant therefore is obliged to show a title, and the king has no need to traverse anything but the title set up. If any one material issue is found for the crown, the crown must have judgment. "The ancient writ of *quo warranto*," said Andrews, J., in *People v. Thacher*, 55 N. Y. 528, S. C., 14 Am. Rep. 312, "was a writ of right for the king, against one who usurps any office, franchise, or liberty to inquire by what authority he supports his claim in order to determine the right: 3 Bla. Com. 262. In theory the king was the fountain of honor, of office, and of privilege. And whenever a subject undertook to exercise a public office or franchise, he was, when called upon by the crown through the writ of *quo warranto*, compelled to show his title, and if he failed to do so, judgment passed against him. The foundation of the rule may have been that, as all offices and franchises are the gift of the king, they were deemed to be possessed by him, and until his grant was shown there could be no presumption that he had parted with them, or invested a subject with the right to exercise by delegation any part of the royal prerogative; but whatever may have been the origin of the rule, it was well established, and was applied also in cases where proceedings by information in the nature of a *quo warranto* were resorted to as a substitute for the writ: *Rez v. Leigh*, 4 Burr. 2143. In this state the rule that, in proceedings by information to try the title to office, the burden is upon the defendant to show his right, and that failing to do so, judgment must go against him, has been frequently recognized: *People v. Utica Ins. Co.*, 15 Johns. 358; *People v. Thompson*, 21 Wend. 252; S. C., 23 Id. 567, 589; *People v. Pease*, 27 N. Y. 63; see also Kyd on Corporations, 399; Cole on Quo Warranto, 221."

The defendant must either disclaim or justify. He cannot plead either not guilty or *non usurpavit*. If he disclaims, the people are at once entitled to judgment; if he justifies, he must set out his title specifically. It is not enough to allege generally that he was duly elected or appointed to the office, but he must state particularly how he was elected or appointed. He must show on the face of the plea that he has a valid title to the office. The people are not bound to show anything. The information calls upon the defendant to show by what warrant he exercises the functions of the office; and he must exhibit good authority for so doing or the people will be entitled to a judgment of ouster. In fine, the law imposes upon him the burden of proving such grant, authority, election, or appointment as invests him with the legal right to the office or franchise in question: High on Extraordinary Legal Remedies, secs. 652, 712; Cole on Criminal Informations, 210-212; Angell and Ames on Corporations, sec. 756; Bull. N. P. 207, 211; Com. Dig., tit. Quo Warranto, C, 4; 9 Coke, 24; 2 Sel. N. P. 339; *State v. Ashley*, 1 Ark. 514; *State v. Harris*, 3 Id. 570; S. C., 36 Am. Dec. 467; *State v. Gleason*, 12 Fla. 266; *Clark v. People*, 15 Ill. 217; *People v. Mills*, 2 Mich. 348; *People v. Utica Ins. Co.*, 15 Johns. 358; S. C., 8 Am. Dec. 243; *People v. Thacher*, 55 N. Y. 525; S. C., 14 Am. Rep. 312; note to *People v. Rensselaer etc. R. R. Co.*, 30 Am. Dec. 52, and cases there cited. In *People v.*

Ridgley, 21 Ill. 67, Mr. Justice Breese, in delivering the opinion of the court, says: "The usual object of an information of this nature is to call in question the defendant's title to the office or franchise claimed and exercised by him, because of some alleged defect therein, as, for instance, that at the time of the election he was disqualified to be elected, or that the election itself was void or irregular, or that the defendant was not duly elected or not duly appointed, or that he has not been duly sworn in or otherwise unlawfully admitted, or that he has since become disqualified and yet presumes to act. A defective title is understood to be, and is in contemplation of law, the same as no title whatever; and a party exercising an office or franchise of a public nature is considered as a mere usurper, unless he has a good and complete title in every respect. This court has decided that the people are not required to show anything. The entire *onus* is on the defendant, and he must show by his plea and prove that he has a valid title to his office. He must set out by what warrant he exercises the functions of the office, and must show good authority for so doing, or the people will be entitled to judgment of ouster: *Clark v. People ex rel. Crane*, 15 Ill. 217. The information, however, must allege that the party against whom it is filed holds and executes some office or franchise, describing it so that it may be seen the case is within the statute." And in *People v. Pease*, 30 Barb. 591, Allen, J., says: "As the name of the writ from which the action derives its name and takes its peculiar characteristics indicates, it is a proceeding in which the defendant is called upon to show his warrant for exercising the duties of the office or other franchise which he claims; and unless he pleads that he did not use the office, or sets up some matter in avoidance of the writ, upon the trial of the action the *onus probandi* lies upon the defendant, who must prove his title to the office: *Cole on Quo Warranto*, 221. The mere right to the office is tried, and not the use under color of right, which would be sufficient ordinarily to establish the right of the incumbent when collaterally questioned, and the defendant must rely on the strength of his own title. The only valid title to an elective office rests upon the choice of the electors, expressed in the prescribed method. No person can claim to be chosen to an elective office who has not received the votes of a majority of those qualified to vote, and who have voted at the election. He who is called upon to make title to an office under an election must, in some way, prove this or he will be ousted."

Nor can the defendant plead that the relator is not entitled to the office. This is no answer to the information. He must show that he is rightfully in office, or the state is entitled to judgment: *Clark v. People*, 15 Ill. 217. The information need not show title in the state to the franchise in question: *People v. Utica Ins. Co.*, 15 Johns. 358; S. C., 8 Am. Dec. 243. Nor is the state bound to show a demand for the office, or to establish any fact save such as may be tendered by replication, and put in issue by rejoinder or other plea: *State v. McDiarmid*, 27 Ark. 176; High on Extraordinary Legal Remedies, sec. 712.

De Facto Officers. — Possession in this proceeding is not evidence of right, and though the acts of an officer *de facto* are valid as to third persons, and his title cannot be inquired into collaterally, in a *quo warranto* proceeding the burden is upon him of showing that his possession is a legal and a rightful one, and he cannot rely upon a merely colorable title, since the aim of the proceeding is to test the legality of the defendant's title, and a legal title therefore he must aver and prove: *People v. Bartlett*, 6 Wend. 422; *People v. Anthony*, 6 Hun, 142; *People v. Thacher*, 55 N. Y. 525. But in Vermont it is held that if the defendant is in the possession of an office, the presump-

tion is, that he was regularly elected; and the relator, being bound to make out his case against the defendant, has the affirmative of the issue: *State v. Hunton*, 28 Vt. 594.

RULE SAME UNDER VARIOUS FORMS OF PROCEEDING. — The rule as to the burden of proof remains the same under the writ of *quo warranto*, under the information in the nature of the writ of *quo warranto*, and under the "action" which is substituted in some states. Whatever the form of the proceeding, its object and purpose are still unchanged, and though the forms of procedure may be altered, the position of the defendant and the rules of evidence and the presumptions of law and fact remain the same: *People v. Thacher*, 55 N. Y. 529; *People v. Pease*, 30 Barb. 591; and the principal case.

DEFENDANT CANNOT RELY UPON PRESUMPTION OF CONTINUANCE OF QUALIFICATIONS. The rule placing the burden of proof upon the defendant in *quo warranto* proceedings has been carried still further, and it has been held that the defendant must show, not only his title to the office or franchise in controversy, but also that he must aver and prove the continued existence of every qualification necessary to the enjoyment of the office. It is not sufficient, it is said, to state the existence of the qualifications necessary to the appointment and rely on the presumption of their continuance, for the law makes no such presumption in his favor: *People v. Mayworm*, 5 Mich. 148; *State v. Beecher*, 15 Ohio, 723.

WHEN BURDEN OF PROOF SHIFTS — PRESUMPTIONS IN FAVOR OF RESPONDENT. — After the defendant has made proof in support of his title, as, for example, that he was declared elected by the proper officers, or appointed by the proper authority, the burden of proof shifts, and the relator in reply may show fraud, etc., *aliunde*: *Cole's Criminal Information*, part 1, 221, 222. And with regard to the sufficiency of proof, and its effect in shifting the burden, there are certain presumptions which operate in favor of the respondent.

Certificate of Election Officers Prima Facie Evidence. — In a proceeding of *quo warranto*, the certificate of the proper officers is *prima facie* evidence of election to a public office. But the certificate and the returns upon which it is based are open to inquiry, and the returns will be corrected or set aside so far as they are shown to be erroneous, if necessary to promote the ends of justice: *People v. Thacher*, 55 N. Y. 525; S. C., 14 Am. Rep. 312. So, since the statutes of the state of New York concerning the elections of wardens and vestrymen in the Protestant Episcopal Church make the rector both the presiding and returning officer, his certificate of election will furnish presumptive evidence of the right of the party receiving it to hold the office and exercise its functions: *People v. Lacoste*, 37 N. Y. 192. And furthermore, if the statute does not provide for any formal written certificate of election to a particular office, the result of the canvass made by the inspectors of the election, and declared by such inspectors, is *prima facie* proof of the election of the person so appearing to have been elected: *State v. Norton*, 46 Wis. 332. The certificate is, however, *prima facie* evidence only, notwithstanding it may be conclusive of the election in a controversy arising collaterally or between the party holding the office and a stranger; for a proceeding between the people and the party to impeach it is a direct proceeding, and it is the will of the electors, and not the certificate, which establishes the right to the office: *People v. Cook*, 8 N. Y. 68; S. C., 59 Am. Dec. 451, and note 471; and see *People v. Thacher*, 55 N. Y. 525; S. C., 14 Am. Rep. 312. But the party who seeks to reject the certificates of the canvassers as irregular must show that the votes were unduly canvassed, or that some facts exist which show

that the certificate does not truly state the result of the popular will. It is not enough for him to show that the board was not regularly constituted, and the poll-lists were not compared, or that other irregularities intervened, provided no illegal votes were received and no legal votes were rejected: *People v. Cook, supra*. The presumption is also in favor of the action of a board of supervisors in removing an office: *State v. Prince*, 45 Wis. 610.

Citizenship. — The record of naturalization of an alien imports verity, and is not impeachable collaterally: *People v. McGowan*, 77 Ill. 646. "It seems clear," said the court, in this case, "both on principle and authority, that a record of naturalization, made by a court of competent jurisdiction, cannot be impeached in a collateral proceeding by showing that the preliminary steps required by law have not, in fact, been taken. It is upon the principle that such a record, like any other judgment of a court, affords competent evidence of its own validity."

Furthermore, when an alien-born person votes at an election, the presumption that he is not entitled to vote, arising from the fact of his being alien born, is not sufficient to exclude his vote on a contest; but the presumption will be that he voted legally. The presumption of law against the commission of a crime will overcome the one against his right to vote arising from the fact of his foreign birth: *Beardstown v. Virginia*, 76 Ill. 35 (bill in chancery to contest an election). In delivering the opinion of the court in this case, Sheldon, J., said: "As the negative allegation here involved a charge of crime, — one voting without qualification at such an election being liable to punishment in the penitentiary, — it was necessary to prove that those giving the votes in question were not legal voters. The presumption that they were not, arising from the fact of being alien born, we think, was not sufficient, but that, they having voted, the presumption would be that they had voted legally, and not committed a crime; and this presumption of law against crime would overcome the former, and it would be necessary to rebut such counter and stronger presumption by some positive evidence to establish the negative. Full and conclusive proof, however, where a party has the burden of proving a negative, is not required; but even vague proof, or such as renders the existence of the negative probable, is in some cases sufficient to change the burden of proof to the other party: *People v. Pease*, 27 N. Y. 45; S. C., 84 Am. Dec. 242; *Commonwealth v. Bredford*, 9 Met. 268; 1 Greenl. Ev., sec. 268."

But where a voter has been proved to have been alien born, and there is *prima facie* evidence that he has not become a citizen by naturalization or otherwise, the burden of showing that he has become a citizen is cast upon the party who desires to retain the vote; and in the absence of such proof, the vote will be disallowed: *People v. Pease*, 27 N. Y. 45; S. C., 84 Am. Dec. 242, and note 268-274, on "contesting elections because of illegal votes, evidence admissible to show what votes are illegal and for whom they were cast, and power to compel unqualified voter to disclose for whom he voted."

So when a person of foreign birth, who was a minor when he came to this country, testified that he had never been naturalized, and did not know that his father had been, the court held that this afforded *prima facie* evidence that such person was not entitled to vote, notwithstanding he had voted: *Beardstown v. Virginia*, 76 Ill. 35.

BURDEN IS ON RELATOR CLAIMING TITLE TO PROVE IT. When the proceeding is in the name of the people or the state on the relation of the attorney-general, the burden of proving his title is on the respondent. But when the proceeding is on the relation of a person who claims that the title

so the office is in himself, while the burden is still upon the respondent to prove his own title, and if he fails, judgment of motion may be rendered against him, the relator must establish his own title, and the burden of proof is so far forth upon him if he would have the judgment also in favor of himself: *People v. Lacoste*, 37 N. Y. 192; *Müller v. English*, 21 N. J. L. 317; *State v. Norton*, 46 Wis. 332; and see *People v. Hobson*, 1 Denio, 579, and cases cited; *People v. Tieman*, 8 Abb. Pr. 359; *People v. Nostrand*, 46 N. Y. 375, 382. And the failure of the defendant to prove his title does not establish that of the relator, for upon that issue the plaintiff has the affirmative, and the burden is upon him to maintain it: *People v. Thacher*, 55 Id. 525. In delivering the opinion of the court in this case, Andrews, J., said: "The people are here the ultimate source of the right to hold a public office; and now, as heretofore when the right of a person exercising an office is challenged in a direct proceeding by the attorney-general, the defendant must establish his title, or judgment will be rendered against him. It results from these considerations that the defendant, in order to have judgment in his favor, was required to prove that he was elected to the office of mayor at the election held in April, 1872. The possession of the office was not in this action evidence of his right. The burden was upon him to show by affirmative evidence that his possession was a legal and rightful one. But a failure on his part to prove his title to the office would not establish that of the relator. Upon the issue of the relator's title, the plaintiffs held the affirmative, and the *onus probandi* was upon them to maintain it. Judgment in the action might have been rendered against the defendant without adjudging that the title to the office was in the relator": Id. 529. Nor is it any answer to the information that the relator is not entitled to the office. "The defendant must show that he is rightfully in office, or the people are entitled to judgment against him": *Clark v. People*, 15 Ill. 217.

Therefore, where one seeks to establish by *quo warranto* his title to the office of clerk of one of the district courts of the city of New York by virtue of an appointment from the justice thereof, he must prove that the person by whom the appointment was made was lawfully entitled to the office of justice. The fact that it was made by one who claimed to be and was then acting as such justice, but who had subsequently been ousted therefrom, was not sufficient: *People v. Anthony*, 6 Hun, 142. So in *People v. Lacoste*, 37 N. Y. 194, it is said: "The relators, in order to succeed in this action, must establish by competent evidence that at the election they, instead of the defendants, were duly elected. The burden is upon them. They must prove, not only that illegal votes were cast for the defendants, but also that if the illegal votes were deducted, the defendants had not received a majority. In other words, it was incumbent on the relators to show that the defendants, who held the certificate of election, and who were in possession of the office, received less than a majority of the votes of the duly qualified electors voting at the election." But when a *prima facie* case is made out by the relator, and there is a failure of proof on the part of the defendant to defeat it, it is proper for the court to direct a verdict for the plaintiff. And to render the direction erroneous, it must be shown that a controverted question of fact was decided by the judge: *People v. Cook*, 8 N. Y. 67, S. C., 59 Am. Dec. 45, affirming S. C., 14 Barb. 259.

It is not necessary for the relator to set forth his title to the office in order to sustain the information against a demurrer, provided the pleadings show a good cause of action in favor of the state: *State v. Palmer*, 24 Wis. 63. And an allegation that the relator, by virtue and warrant of due and regular

election, is in law and in right entitled to have, hold, and exercise said office is sufficient, without setting out the title specifically: *People v. Miles*, 2 Mich. 343. But see, *contra*, *State v. Boal*, 46 Mo. 523; and see also the note to *People v. Rensselaer etc. R. R. Co.*, 30 Am. Dec. 51.

CORPORATIONS AND CORPORATE OFFICERS. — "As regards the title necessary to be shown by the prosecutor in order to support the information, a distinction is taken between cases affecting merely private rights, where the proceedings are instituted in behalf of a private citizen, and cases affecting public interests, where the people are the real as well as nominal prosecutor. For example, where the object of the information is to remove respondents from certain corporate offices of which they are incumbents, it is necessary that the relators show a title in themselves before they can properly inquire by what authority the respondents exercise their office or franchise, and a failure to show such title is fatal to the application": High on Extraordinary Legal Remedies, sec. 652, citing *Miller v. English*, 21 N. J. L. 317. "And it would seem," continues Mr. High, "that an information would not be allowed in behalf of one corporator against another, on the ground of a defect or title, which applies equally to the relator, or to those under whom he claims, even though he has been for many years in the uninterrupted enjoyment of his franchise": *Id.*, citing *King v. Cudlipp*, 6 Term Rep. 503; *King v. Cowell*, 6 Dowl. & R. 336. So, also, in the principal case the court held that the burden of proof was upon the relator.

If, however, the proceeding against a corporation is founded on an alleged usurpation of power, and is instituted by the state, and not on the relation of a private person, the burden of proof is on the defendant to disclaim or justify, and the state is not bound to make affirmative proof. In such case the burden is upon the respondent to show title, and if the title relied upon in defense be incomplete, the state or "the people," as the case may be, are entitled to judgment: *People v. Utica Ins. Co.*, 15 Johns. 358; S. C., 8 Am. Dec. 243; *State v. Harris*, 3 Ark. 570; S. C., 36 Am. Dec. 460; Angell and Ames on Corporations, sec. 756. And when, in such a proceeding, a president of a corporation is defendant, he must show the existence of the corporation, that he is possessed of the qualifications required by law of the incumbent of the office of president thereof, and that he is the president: *State v. Harris*, 3 Ark. 570; S. C., 36 Am. Dec. 460; but he need not show that the several members of the different boards, by the election of which he derives title, were either citizens of the state, or stockholders or directors *de jure*, but only that in each instance there was a board, acting under color of a legal right, and in every respect legally competent to make the election. If there was any incapacity, disqualification, or want of qualification in the board, the state must show it. The law presumes those who act in such capacities, under color of right, as possessed of every requisite qualification, and that their acts are authorized and valid until the contrary appears: *Id.*; and see the principal case. In pleading an election to the office of director by the stockholders of a corporation, however, defendant must show that the election was held agreeably to law, and in conformity with and in pursuance of the ordinances and regulations of the governing board of the corporation, and that at such election he received a majority of the legal votes cast; and if his claim is by virtue of an election by the board of directors, to supply a vacancy therein, he must show the existence of a board competent to elect, and that a vacancy existed therein, and how such vacancy arose, and his subsequent election: *State v. Harris, supra*.

ABANDONMENT AND FORFEITURE. — If a corporation is shown to have been once in existence, its continuance is presumed until the contrary is shown: *Angell and Ames on Corporations*, sec. 756; *People v. Manhattan Co.*, 9 Wend. 351, 378. So when the pleadings admit that the parties owning a toll-road franchise have a good title, and the proceeding to have the franchise forfeited is based solely upon a claim of abandonment or forfeiture, the affirmative of the issue and the burden of proof is on the state. "The general rule in cases of this character is, that the person claiming the franchise must plead and prove a good title thereto, and that the state is bound to prove nothing; but when, as in this case, it is admitted that the defendant has had a good title, and the only ground of the proceeding is a claim of abandonment or forfeiture, the affirmative of the issue and the burden of proof is on the state. Proceedings upon *quo warranto* and information in the nature thereof are regulated by statute in this state, and it is therein provided that the issues are to be tried as in other civil actions. This being so, it follows that the state, like any other party relying on a forfeiture or an abandonment, must prove its case": *State v. Haskell*, 14 Nev. 209.

In *People v. Fishkill etc. Plank Road Co.*, 27 Barb. 445, however, it is held that the certificate of the inspectors, under section 34 of the general plank-road act, is not conclusive upon the state in a direct proceeding against a plank-road company to test the manner in which the road has been constructed, so as to estop the people from averring and insisting upon forfeitures previously incurred. And in *State v. Essex Bank*, 8 Vt. 489, it is held that, although the withdrawing of bank stock under the form of loans upon private security, if permitted with intent to reduce the effective capital below the amount required by the charter, is a violation of the charter; yet on proceeding had by information, for the purpose of vacating the charter, it is not a matter of course that for this cause it will be declared vacated. The power of the court is to be exercised in discretion; and if no existing danger to the community requires it to be exercised, the court will decline to exercise it.

DAMAGES. — No proof is permissible, either at common law or under the English statutes, as to damages. The English judgment, if for relator, is motion and costs, or, if for respondent, for costs: *Cole on Criminal Information*, part 1, 236-238.

PLEADINGS AND PROCEEDINGS ON QUO WARRANTO. — An extensive note upon this topic is appended to *People v. Rensselaer etc. R. R. Co.*, 30 Am. Dec. 44-52.

REMOVAL OF OFFICER OF CORPORATION: *Neill v. Hill*, 76 Am. Dec. 508, and note 515.

PERSONS ACTING AS OFFICERS of corporation are presumed to be rightfully in office: *Sangamon etc. R. R. Co. v. Morgan Co.*, 56 Am. Dec. 497; *Selma etc. R. R. Co. v. Tipton*, 39 Id. 344. And a party claiming under their acts is presumed properly elected: *Sangamon etc. R. R. Co. v. Morgan Co.*, *supra*. All of their acts are presumed valid and regular, and the burden of proof is on the attacking party: *Chouteau Ins. Co. v. Holmes*, 68 Mo. 602, citing the principal case.

FILLEY v. FASSETT.

[44 MISSOURI, 100.]

TRADE-MARK — DEFENSE. — Fact that party in another state manufactured articles and put them upon the market to compete with plaintiffs using his trade-mark is no defense for a third party whom plaintiff seeks to enjoin from using his trade-mark, unless plaintiff assented to or acquiesced in such infringement on his right. In other words, the depredations of others upon plaintiff's rights is no excuse to defendant for similar acts on his part.

DISPUTED TRADE-MARK CANNOT BE APPROPRIATED by filing in the recorder's office a written claim thereto, although the original claimant had never filed such document for registration.

MISSOURI STATUTE WAS NOT DESIGNED TO WEAKEN OR ABRIDGE any existing rights, or any future right, to a trade-mark which might be acquired, or to legalize, in any form or measure, piracy in trade-marks.

MISSOURI STATUTE REQUIRING REGISTRATION OF TRADE-MARKS has no application to articles made in another state.

MISSOURI STATUTE WILL NOT WARRANT APPROPRIATION OF EXISTING TRADE-MARK by one party, when the ownership and title to it is in another.

TRADE-MARK MAY CONSIST OF ANY CONTRIVANCE, design, name, symbol, or other thing, which is adapted to accomplish the object proposed by it, namely, to point out the true source and origin of the article to which the mark is applied, or to point out and designate the dealer's place of business, distinguishing it from the business locality of other dealers.

TRADE-MARK MUST POINT OUT SOURCE AND ORIGIN of the goods, and not be merely descriptive of the style, quality, or character of them.

BY ADOPTION AND USE OF TRADE-MARK, the party claiming it acquires a property interest therein which the courts will protect.

WHEN PLAINTIFF'S ARTICLE IS NOT CONSPICUOUSLY KNOWN by the device which surrounds the name, the whole of which constitutes the trade-mark, but by the name itself, the adoption of such name for an article manufactured by another is an infringement of the former's right, for if the name as used was calculated to mislead, the intention to deceive is inferred.

IMITATION OF TRADE-MARK TO CONSTITUTE INFRINGEMENT need not be exact or perfect. It may be limited or partial, nor is it requisite that the whole should be pirated, nor is it necessary to show that any one has in fact been deceived, or that the party complained of made the article; nor is it necessary to show intentional fraud; and if the court sees that plaintiff's trade-mark is simulated in such manner as to deceive patrons of his business, the piracy will be checked by injunction.

THE opinion contains the facts.

Charles Le R. Moss, for the appellants.

S. S. Boyd, for the respondent.

By Court, CURRIER, J. In 1851, the plaintiff employed N. S. Vedder, an extensive stove-pattern maker of Troy, New York, to design and construct for him a set or series of cooking-stove patterns. The patterns were made as ordered, and

in a form which resulted in the production of a cooking-stove of a new and improved interior arrangement and construction, for which Vedder obtained letters patent, which he assigned to the plaintiff. The plaintiff originated and applied to the stove the name "Charter Oak," which was so formed upon the patterns as to produce the name upon the manufactured article, in combination with a sprig of oak leaves. The name and device was employed to distinguish and designate cooking-stoves of the plaintiff's manufacture. The manufacture and sale commenced the following year, and has been followed up continuously ever since, the sales from 1852 to 1867, both years inclusive, amounting to 119,226. These stoves were distributed broadly through the western and southern country, and appear to have been highly popular and successful.

The testimony shows that stoves are usually known in the trade by their distinctive names and designations, such as "Excelsior," "Climax," "Empire," "Charter Oak," etc.; and that they are advertised and bought and sold by such names and designations; that when a stove is favorably received, and acquires popularity in the market and with those who use it, the peculiar name by which it is known and distinguished becomes a matter of importance to the manufacturer, and of great value to him in the prosecution of his business. The extent of the plaintiff's sales of his "Charter Oak" cooking-stove indicates its reputation and popularity, and the consequent value to him of the name by which it was known.

But the answer denies that the plaintiff first appropriated and used that name in such connection as indicating the source and origin of the article to which it was applied, and denies that his use of it has been either exclusive or uninterruptedly continuous, and avers that the contrary of all this is true. Upon these issues a large mass of testimony was taken, from which the following facts are deduced: 1. That the plaintiff's appropriation of the name "Charter Oak," as already detailed, was prior in point of time to any similar use of that name by any other parties. The testimony is clear and entirely satisfactory on this point. 2. That notwithstanding such appropriation by the plaintiff, different manufacturers in Cincinnati, and in that region, at different times subsequently to 1852, applied the same name to cooking-stoves of their manufacture, but without the consent of the plaintiff in any instance, and without his knowledge, except in two instances. The first of these two occurred in 1854, and was at

once checked by the plaintiff, and abandoned by the Cincinnati manufacturer on being apprised of the plaintiff's rights. The other is that of the manufacture of the stoves, the sale of which, with the plaintiff's alleged trade-mark upon them, is sought to be enjoined by this suit; and the suit was commenced immediately after the facts came to the knowledge of the plaintiff. 3. That J. S. & M. Peckham, of Utica, Oneida County, New York, manufactured in Utica a "Charter Oak" cooking-stove, from 1852 to 1857, and then abandoned it, and never after resumed the manufacture of that particular stove. The Peckhams purchased their patterns for this stove of said N. S. Vedder, Filley consenting to the sale on condition that certain alterations were first made in the patterns. This transaction does not appear to have included specifically the right to use the plaintiff's trade-mark, nor does it appear that Filley was ever made aware that the purchasers in fact used it. The design of the stove was patented, and the transaction with the Peckhams involved the granting to them the right to manufacture, in Oneida County, its patented features; that, with the right to sell in a defined territory, would seem to have constituted the inducement to the purchase of these patterns, rather than others. The particular name which the plaintiff had originated for the stove which he proposed to make does not appear to have been mentioned in the negotiations with the Peckhams, or to have been in the minds of the parties. It ought not, therefore, to be inferred from the mere permission granted to Vedder to sell the modified patterns that the plaintiff licensed or sold out the use of his trade-mark, particularly in a contest with third parties; the Peckhams themselves disavowing all right, claim, or interest in the trade-mark, either as originators or purchasers. 4. That the plaintiff's use of the trade-mark claimed by him has been continuous and uninterrupted since its first adoption by him to the present time.

The fact that parties in Cincinnati or elsewhere manufactured "Charter Oak" stoves, and sent them into the market to compete with the plaintiff's manufactures, in no way aids the defense, unless it appears that the plaintiff assented to or acquiesced in such infringements upon his rights; and, as already indicated, there is nothing in the case to establish a dedication or abandonment to the public, on the part of the plaintiff, of his supposed rights of property in the alleged trade-mark. There is no testimony having that tendency,

except the transaction with the Peckhams, and that is insufficient. In *Gillott v. Esterbrook*, 47 Barb. 455, it appeared that an imitation of the plaintiff's mark had been in use for many years, and that for twenty years he had issued printed "cautions" to the public on the subject, implying knowledge, on his part, of such use; but that was held no acquiescence, although the plaintiff had neglected to institute prosecutions.

The depredations of others upon plaintiff's rights furnish no excuse to the defendants for similar acts on their part. It is rather an aggravation to the plaintiff that others have also injured him, and courts have not shown any disposition to encourage that line of defense. Woodbury, J., in *Taylor v. Carpenter*, 2 Wood. & M. 8, held this language: "There is something abhorrent in allowing such a defense to a wrong which consists in counterfeiting others' marks or stamps, defrauding others of what had been gained by their industry and skill, and robbing them of the fruit of their good name, merely because they have shown forbearance and kindness." See observations of Story, J., same case, 3 Story, 464.

After this suit was commenced, Rosenbaum & Co., who seem to be the real parties defending against the action, made an attempt to appropriate the disputed trade-mark to their own use, in due form of law, by filing in the office of recorder of deeds, in the county of St. Louis, a written claim thereto, under the act of March, 1866: Gen. Stats. 1865, p. 912. A certified copy of the paper so filed, declaring that said Rosenbaum & Co. had adopted "Charter Oak" as their trade-mark for stoves manufactured by them, was given in evidence, and relied upon as showing their title to the trade-mark as against Filley, who had never filed any such document. If this proceeding can be made available for the purpose intended, it may be regarded as an entirely new and improved method of disposing of trade-mark cases, and of appropriating the property of others, the subject of such suits, without risk or inconvenience, and at very slight cost.

A glance at the statute, however, shows that it was intended for no such purpose. It was not designed in the slightest particular to weaken or abridge any existing rights, or any future right, to a trade-mark which might be acquired in the usual way, or to legalize, in any form or measure, piracy in trade-marks. Property in a trade-mark is acquired at common law only by appropriation and use, and then only of such names, words, and devices as may be held to be adapted to point out

the true source and origin of the goods to which such marks are applied. The statute widens the range of selection, and authorizes the mechanic or manufacturer to adopt any name or device he pleases, and to foreclose any controversy on the subject by writing out and filing with the recorder, as the law provides, an accurate description of the name, device, etc., that may have been chosen. But such paper is to be filed in the county where the goods, etc., are to be manufactured or prepared. It is not perceived how this can be made to apply to Rosenbaum & Co.'s stoves, which are manufactured in another state. The statute has no application to the facts of the present litigation. Nor will any fair construction of it warrant the appropriation by one party of an existing trade-mark, the title and ownership of which is in another party.

But it is objected that the words "Charter Oak," with the accompanying device, lack the requisite ingredients or characteristics of a trade-mark, and therefore it is insisted that the plaintiff could acquire no exclusive right to their use for that purpose. The books are full of authorities establishing the proposition that any contrivance, design, device, name, symbol, or other thing may be employed as a trade-mark which is adapted to accomplish the object proposed by it,—that is, to point out the true source and origin of the goods to which said mark is applied, or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. The mark, however, must possess the requisite characteristics, pointing out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of the goods themselves. Thus it has repeatedly been held that where the name or device employed had, from use or other cause, come to be descriptive of the goods manufactured or sold, their quality and use, such name or device was ineffectual, and could not be upheld as a trade-mark. It was so as to the letters "A. C. A.," in the leading and famous case of the *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599; as also in *Stokes v. Landgraft*, 17 Barb. 608, and in various other cases cited by the defendants. But these authorities have no application to the mark claimed by the plaintiff; for the name "Charter Oak," with the combined device, in no possible view or application of them, are either descriptions or suggestive of the style, character, or qualities of a cast-iron cooking-stove. In their natural significancy, import, or symbolism, or in the use made of them prior to the plaintiff's

appropriation of them as a trade-mark, they were as far removed as can well be imagined from conveying any such application or meaning. And that constitutes one of their virtues as a trade-mark: *Fettridge v. Merchant*, 4 Abb. Pr. 158; *Perry v. Truefitt*, 6 Beav. 66; *Coffeen v. Brunton*, 4 McLean, 516.

The general rule respecting the characteristics of trade-marks has already been given. The following names and designations, among many others, have been held to come within that rule: As pointing to a hotel, "Irving House": *Howard v. Henriques*, 3 Sand. 726; "Revere House": *Marsh v. Billings*, 7 Cush. 322 [54 Am. Dec. 723]; as pointing to a manufacturer or dealer, "Cocoaine": *Burnett v. Phalon*, 9 Bosw. 192; "Howe": *Howe v. Howe M. Co.*, 50 Barb. 236; "Akron," the name of a town: *Newman v. Alvord*, 49 Id. 599; "London Conveyance Company": *Knott v. Morgan*, 2 Keen, 220; "303," the designation of a particular pen: *Gillott v. Esterbrook*, 47 Barb. 471; "Bell's Life," the name of a newspaper: *Clement v. Maddick*, 1 Giff. 98; "Roger Williams Long Cloth": *Barrows v. Knight*, 6 R. I. 434 [78 Am. Dec. 452]; "Day & Martin": *Croft v. Day*, 7 Beav. 89. The name and device selected by the plaintiff were adapted to point out the true source and origin of the stoves to which he applied them, and were therefore possessed of the requisite characteristics of a trade-mark. By the adoption and use of that mark, he acquired a property interest therein which the courts will protect. Have the defendants invaded the rights of the plaintiff in this behalf? The defendants accumulated in the St. Louis market a quantity of the Rosenbaum & Co. stoves, with the name "Charter Oak" upon them, which they held for sale as "Charter Oak" stoves. They were aware of the plaintiff's proprietorship of the "Charter Oak" trade-mark, and were proceeding to sell in defiance of plaintiff's rights.

In this condition of things, the present suit was instituted, and an injunction granted restraining the defendants from the proposed sale. The only question raised on this branch of the case is, whether the use of the name "Charter Oak," separated from the other parts of the plaintiff's mark, amounted to an infringement of his rights, assuming his ownership of the name as a trade-mark, in combination with the device of oak leaves. On this point there can be no reasonable doubt. The plaintiff's stoves were not conspicuously known by the particular device which surrounded the name upon them, but by the

name itself. That was the conspicuous element in the mark. By that name the stove was bought and sold, and known in the western and southern markets. It was the prominent, essential, and vital feature of the plaintiff's trade-mark. That name the defendants and their principals appropriated bodily, and applied it to their stoves, and sought to acquire the sole and exclusive use of it by filing their claim in the recorder's office under the statute. That shows their appreciation of the value of the name, and of their purpose, not only to use it themselves, but to exclude the originator of it from its use. Granting Filley's exclusive right, there can be no doubt that the things done and purposed by the defendants were of injurious tendency, and that the name "Charter Oak," as employed by them, was eminently calculated to mislead buyers as to the true source and origin of the stove to which the defendants applied that name. If the name, as used by them, was calculated to mislead, the intention to deceive is to be inferred therefrom: *Fettridge v. Merchant*, 4 Abb. Pr. 159; *Crawshay v. Thompson*, 4 Man. & G. 385.

The imitation of an original trade-mark need not be exact or perfect; it may be limited and partial. Nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has in fact been deceived, or that the party complained of made the goods: *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 607; *Clark v. Clark*, 25 Barb. 79; *Edleston v. Vick*, 23 Eng. L. & Eq. 53, 54; *Coats v. Holbrook*, 2 Sand. Ch. 597. Nor is it necessary to prove intentional fraud. "If the court sees that complainant's trade-marks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunction": *Coffeen v. Brunton*, 4 McLean, 519; *Partridge v. Menck*, 2 Barb. Ch. 103 [47 Am. Dec. 281].

The result is, that the judgment of the circuit court must be affirmed.

The other judges concurred.

SUBJECT OF TRADE-MARKS is treated in note to *Partridge v. Menck*, 47 Am. Dec. 284-299.

TRADE-MARK, OF WHAT MAY CONSIST, and how protected: *Falkenburg v. Lucy*, 95 Am. Dec. 76, and note 90; *Boardman v. Meriden Britannia Co.*, 95 Id. 270, and note 277.

TRADE-MARK IS PROPERTY, AND INFRINGEMENT thereof will be enjoined: *Bradley v. Norton*, 87 Am. Dec. 200; *Derringer v. Plate*, 87 Id. 170, and notes to these cases.

IMITATION OF TRADE-MARK, TO CONSTITUTE INFRINGEMENT, need not be precise copy; but if there is substantial similarity, so that the community would be likely to be deceived, it is sufficient: *Bradley v. Norton*, 87 Am. Dec. 200, and note 204.

TRADE-MARKS ARE PROTECTED, not exclusively on the ground of fraud, but on the ground of property: *Skinner v. Oakes*, 10 Mo. App. 55. And a party who has appropriated a particular trade-mark, to distinguish his goods from other similar goods, has a right of property in it which entitles him to its exclusive use. This right equity will protect from invasion by injunction; and if it is invaded, the wrong-doer is liable in damages, which damage consists of the loss of profits resulting from the infringement: *Hostetter v. Vowinkle*, 1 Dill. 332, both citing the principal case.

TRADE-MARK MUST POINT OUT ORIGIN or ownership of article to which it is applied, or it must designate the dealer's place of business, distinguishing it from the business locality of other dealers: *Marshall v. Pinkham*, 52 Wis. 578.

IMITATION OF TRADE-MARK, to be infringement, need not be exact or precise; nor is it necessary to prove actual fraud in the imitator to entitle the owner to relief in equity or damages at law: *McCann v. Anthony*, 21 Mo. App. 90, citing the principal case.

ALLEN v. RANSON.

[44 MISSOURI, 263.]

SUIT IN EJECTMENT MUST PROCEED in the name of the plaintiff if he is a non-resident, even after a suggestion that he is insane, as the court has no power to appoint a guardian.

WHERE PARTY SUED IN EJECTMENT has both the possession and a life estate in the property, and has conveyed it by mortgage to the plaintiff, he cannot retain the possession, by showing that when his curtesy ceases, the heirs of his deceased wife may perhaps be entitled to it.

MORTGAGEE, WITHOUT FORECLOSURE OR SALE, may, after maturity of the obligation, maintain ejectment against the mortgagor.

WHERE DEFENDANT IN EJECTMENT HAS POSSESSION and a life estate in the property, his heirs cannot be made parties defendant with him.

AMENDMENT WHEN ALLOWED.—If facts are developed upon the trial that will enable the defendant to impeach the transaction upon which suit is based, or if he is taken by surprise by these facts, or if other facts have come to his knowledge since making up the issues, or if any other good excuse can be given for not having made them up, so as to admit desired testimony, he should be permitted to amend. But this is a matter of discretion with the court, and will be presumed to have been soundly exercised until the contrary is shown.

MORTGAGEE WITH POWER OF SALE is trustee as well as creditor, and cannot become purchaser at his own sale, either directly or indirectly, so as to cut off the equity of redemption. Such sale is not void; it is valid for all purposes except that the mortgagor may redeem.

IN EJECTMENT, VALUE OF RENTS and profits may be proved, but the value of the premises cannot.

THE opinion contains the facts.

Douglass and Gage, for the plaintiff in error.

J. B. Hovey, for the defendant in error.

By Court, BLISS, J. Defendant and wife, with her two brothers, W. W. and George W. Talley, on the 1st of December, 1859, executed to plaintiff a mortgage of forty acres of land near Kansas City, to secure the payment of defendant's note to plaintiff for \$3,549.73. The mortgage contained a power of sale by the mortgagee, or by the marshal of the court of common pleas of Kansas City, and was acknowledged before a justice of the peace. On the 18th of April, 1862, John G. Hayden, then marshal of said court of common pleas, advertised and sold the property at public sale, and it was bid in for three thousand six hundred dollars by one S. S. Smith, who afterward deeded it to the plaintiff. The wife of defendant being dead, he continued in possession of the property, and this is an action of ejectment brought against him by the plaintiff.

The record shows that, upon trial in the circuit court, the plaintiff showed title in the wife of defendant and her said brothers at the time of the mortgage, its execution by them, the sale by the marshal and deed to Smith, and the deed by Smith to him; also, that children were born alive to said defendant and wife.

The claim of the plaintiff seems to have been sharply contested, and various questions were sprung upon him. First, as the case was called for trial, the defendant filed a paper suggesting to the court "that the plaintiff was insane," to which suggestion the court paid but little attention, and directed the trial to proceed, and defendant excepted. I do not see precisely the object of the suggestion, nor does the record intimate it. Even if the suggestion were true, which does not appear, the suit must proceed in the name of the plaintiff, and he might all the more require for his support the possession of his property: 2 Saunders on Pleading and Evidence, 318; *Reed v. Wilson*, 13 Mo. 28. Allen, the plaintiff, is said to be a non-resident, and I see no provision for appointing a guardian in this state.

The defendant also objected to reading the mortgage in evidence, for the reason that it was acknowledged before a justice of the peace; and claims, under the decision of this court in

West v. Best, 28 Mo. 551, that such acknowledgment did not pass the estate of the wife. It is not necessary either to approve or overrule the doctrine of that case, inasmuch as the acknowledgment of the defendant is not impeached by the supposed defect in that of his wife. He has both the possession and a life estate in the property; and having conveyed the property to the plaintiff by this mortgage, cannot retain the possession by showing that when his curtesy ceases the heirs of his deceased wife may perhaps be entitled to it. There is no such issue now as calls for an adjudication either upon the character of the acknowledgment, or the validity of the curative act of February 15, 1864. When the heirs, who are not parties to this record, shall seek to enforce their claim to the property, it will then be necessary to pass upon the validity of the deed as against Mrs. Ranson. It is now sufficient to say that whatever may be the effect of the supposed defect in the acknowledgment upon the rights of Mrs. Ranson's heirs, Ranson himself has a possessory title which is vested in the plaintiff: *Beal v. Harmer*, 38 Mo. 439; *Bryan v. Wear*, 4 Id. 106. Besides, a mortgagee, even without foreclosure or sale, may, after maturity of the obligation, maintain ejectment against the mortgagor.

If this view be correct, it disposes of another allegation of error in the record. The defendant, on the trial, sought to compel the plaintiff to make the heirs of Mrs. Ranson parties to this suit, and the court very properly held it to be unnecessary to do so. The defendant is the person in possession, and not the heirs. They hold under him, if they are in at all, and not he under them. They can have no estate during his life; and for the court to have required the plaintiff to make them parties, and establish his rights as against them, as well as against the defendant, would have been a burden it had no right to impose on him.

I find in the bill of exceptions the following statement: "The defendant then offered to prove that the title of plaintiff to the land in controversy, both from Hayden, the marshal, and from Smith, to plaintiff, was a fraud upon defendant. The plaintiff objected, because fraud was not alleged in the answer. . . . The court would not let him prove it, and defendant excepted. Defendant then asked leave to amend his answer, at the trial, upon terms so as to set up the fraud he attempted to prove; but the court would not let him," etc., and he excepted. The district court makes the refusal of the circuit court to

receive the evidence or permit the amendment ground for reversal of the judgment, although the judge delivering the opinion pertinently remarks that "it would have been more satisfactory if the defendant had stated the questions he proposed to propound, in order to elicit the fraud; and when he offered to amend, to have stated the amendment he proposed to make."

Now, it nowhere appears what the defendant wished to prove, or what amendment he wished to make. He offered to prove a conclusion of law,—an inference from facts; but the facts are concealed. The parties had made up their issues, and during their investigation the defendant made a general proposition to prove fraud, though what kind of fraud, or how perpetrated, he does not show. Fraud vitiates everything; and if facts were developed upon the trial that would enable the defendant to impeach the transaction upon which the suit was based,—if he were taken by surprise by these facts, or if other facts had come to his knowledge since making up the issues, or any other good excuse could be given for not having made up the issues, so as to admit the testimony he desired to offer, — he should be permitted to amend upon terms. But he must play an open hand,—must disclose his testimony and the nature of his amendment, and show to the court that he is acting in good faith,—or he will be suspected of maneuvering for delay. The court committed no error in refusing his testimony, if he had any outside of the issues, and in rejecting his general application to amend. This is necessarily so much a matter of discretion in the court trying the case, that we must presume that discretion was soundly exercised unless the contrary is shown by a full exhibit.

The defendant objected to the plaintiff's right of recovery upon the ground that, as mortgagee with power to sell, he was a trustee; that Smith, at the marshal's sale, simply purchased as his agent; that he as trustee had no power to purchase, and hence acquired no such title as would authorize him to take possession of the premises. Admitting the relation between the parties, and that the plaintiff was the actual purchaser, is it true that the sale was void, and that the purchaser acquired no title? It is well settled that a mortgagee with power of sale is a trustee as well as a creditor, and that at his own sale he cannot become the purchaser, either directly or indirectly, so as to cut off the equity of redemption. But such a sale is not void. It is good as to all the world, and for all purposes,

excepting only that the mortgagor still has the right to pay the debt and redeem the land. Purchases by some classes of trustees at their own sales are sometimes treated as void, but never in sales of this kind. This subject was fully considered in *Thornton v. Irwin*, 43 Mo. 153, where we held that the mortgagor had a right to redeem, notwithstanding the sale; but I know of no case in this or any other court where such sales are treated as a nullity. The instructions to the jury based upon that hypothesis, asked for by the defendant, were very properly refused.

I can see no error whatever in the instructions given at the instance of the plaintiff, and excepted to by defendant. They hypothecate a complete case; and the jury are told that if they believe from the evidence the facts hypothecated, they must find a verdict for the plaintiff. It is a convenient way of summing up the facts necessary to be proved, and bringing them directly before the jury, and they are less likely to be deceived than if the instructions were more abstract.

Upon the trial, the defendant sought to prove the value of the property, and was not permitted by the court to do so. I cannot see for what legitimate object the evidence was offered. The value of the rents and profits was in issue, and evidence was received upon that point; but whether the property would sell for a thousand or ten thousand dollars is not material. The decision either way would not decide the amount of rent to be recovered, or the plaintiff's right to the possession.

The defendant asked for several instructions based upon his claims as heretofore considered, which were refused by the court. It is unnecessary to consider them in detail, as they are all covered by this opinion. One or two of the instructions refused were correct in the abstract, but did not apply to the case.

The judgment of the district court reversing that of the circuit court should be reversed, and the judgment of the circuit court be affirmed.

The other judges concurred.

MORTGAGEES MAY MAINTAIN EJECTMENT AGAINST MORTGAGOR: *Carroll v. Ballance*, 79 Am. Dec. 354, and note 361.

MORTGAGEES WITH POWER OF SALE, whether can purchase directly or indirectly, at his own sale, and whether such sale is voidable or void: *Blockley v. Fowler*, 82 Am. Dec. 747, and note 749. Mortgagees with power of sale

cannot, either directly or indirectly, purchase at his own sale, so as to cut off the equity of redemption; but such purchase is not absolutely void; it is valid as against all except the mortgagor's right to redeem: *Reddick v. Gressman*, 49 Mo. 392; *Gains v. Allen*, 58 Id. 545; *McNees v. Swaney*, 50 Id. 388; *Kitchen v. St. Louis etc. R'y Co.*, 69 Id. 280, all citing the principal case.

APPLICATION TO AMEND, ON GROUND OF VARIANCE between the pleadings and proof of the opposite party, will not be allowed, unless the statutory affidavit is filed showing that the moving party has been misled to his prejudice: *Bank of Pleasant Hill v. Wills*, 79 Mo. 277. So where an answer averred that the sum sued on was not due at the time the answer was filed, and on the second trial of the case defendant asked to amend, that the sum was not due when the action was brought, it was held properly refused: *Simmons v. Carrier*, 68 Id. 422, both citing the principal case.

MERCHANTS' BANK OF ST. LOUIS v. EASLEY.

[44 MISSOURI, 286.]

IN ACTION AGAINST DRAWER OF BILL OF EXCHANGE without notice of dishonor, plaintiff may bring his case *prima facie* within the exception or rule which excuses want of notice by alleging that defendant had no funds in the hands of the drawee, and if there are other facts neutralizing the effect of that, the burden is on the defendant to plead and prove them.

ACCOMMODATION DRAWER OF BILL OF EXCHANGE is entitled to notice of dishonor, when there is no fund in the hands of the drawee.

DRAWER OF BILL OF EXCHANGE IS PRESUMED to be an interested and benefited party, as drawing for his own use, and the burden is on him to prove himself an accommodation drawer.

THE opinion states the facts.

James F. Hardin, for the plaintiff in error.

James Baker and T. A. Sherwood, for the defendant in error.

By Court, CURRIER, J. The plaintiffs sued on a bill of exchange drawn by the defendant on a third party, by whom it was accepted. The payee and another party indorsed the bill, and it was thereupon discounted by the plaintiffs. It matured and was not paid. No notice of its dishonor was given to the defendant. The plaintiffs, to excuse this neglect, aver in their petition that the drawer had no effects in the hands of the drawee, either at the time the bill was made or at its maturity, or at any time during the intervening period. The evidence and verdict sustain these averments. A well-understood rule of commercial law makes it the duty of the holder of a dishonored bill of exchange, immediately upon its dishonor, to notify all prior parties thereto on whom he would fix liability for ultimate payment. The plaintiffs seek to take

the present case out of this general rule, and to bring it within the scope of a well-recognized exception thereto, namely, that such notice may be dispensed with (as also presentment) where the drawer has no effects in the hands of the drawee, as the facts are alleged to exist in the present suit: 1 Story on Bills, sec. 367, and notes; 1 Parsons on Notes and Bills, 463, and cases cited.

The allegations of the petition, which are sustained by the verdict, bring the plaintiff's case *prima facie* within this exception. But the exception itself has various qualifications, as where the drawer kept an open account with the drawee, with fluctuating balances, or has consigned to him merchandise, and was so situated in relation to the drawee that the drawer had a just and reasonable expectation that the bill would be duly provided for at maturity. In such cases the drawer is entitled to notice, notwithstanding that, in the result, these expectations entirely failed: 1 Parsons on Notes and Bills, 535 et seq. The question therefore arises whether it was not the duty of the plaintiffs, by their pleadings and evidence, to exclude these qualifying circumstances, in order successfully to relieve themselves from the general rule, the effects of which they are seeking to escape. These qualifying matters, it is obvious, lie peculiarly within the knowledge of the opposite party, and are difficult of proof by the plaintiffs. It would seem reasonable, therefore, that the person possessing the knowledge should allege the qualifying facts in defense, and make proof thereof; and so the courts seem to hold: *Kemble v. Mills*, 1 Man. & G. 757, 771; *Durrum v. Hendrick*, 4 Tex. 495; *Tarver v. Nance*, 5 Ala. 712; *Cook v. Martin*, 5 Smedes & M. 379; 1 Parsons on Notes and Bills, 550, and note i, 554. It was enough, then, for the plaintiffs to state facts sufficient to bring the case *prima facie* within the scope of the exception. If there were other facts within the knowledge of the opposite party, neutralizing the effect of these, it was appropriately left to that party to plead them in defense.

The defendant, however, urges the further objection that he stands in the attitude of an accommodation drawer for the benefit of the other parties to the bill, and insists that he ought to have had notice for that reason. If that were his true relation to the bill, and to the other parties, there might be force in the objection, since the failure of notice might have affected him injuriously in respect to his recourse against the real principals of the bill.

But how stands this matter? The plaintiffs aver in their petition that the bill was made for the accommodation of all the parties to it, thus apparently assuming the *onus* of proof on this point. The defendant takes issue on this averment, and denies that the bill was made for his benefit. The plaintiffs' averment might perhaps be treated as surplusage; but I will not consider that view, since it is not necessary to a disposition of the case. No evidence was produced on the trial bearing on this issue, except the bill of exchange itself. That was in evidence. What was its effect?

The original and foundation idea of the commercial instrument called a bill of exchange is, that the drawer has funds or effects in the hands of the drawee which the drawer wishes to avail himself of at the place where the bill is made,—the drawer being the party primarily interested in and benefited by the transaction. By this instrument of exchange, he appropriates the fund, actual or anticipated, in the drawee's hands, and receives the consideration for the appropriation from the payee, to whom the instrument of appropriation is delivered. He therefore stands on the face of the paper as an interested and benefited party. His position implies this, and the paper itself is evidence of his interest,—evidence that the bill was drawn for his benefit. If he would avoid the legal inference deducible from his position, he must furnish the countervailing proof to rebut and overcome these inferences. The *onus* is on him. In the absence of such countervailing proof, he must be held as an interested and benefited party,—as drawing for his own use. It is not to be presumed that he drew for the accommodation of others. The presumption, as already stated, is directly the other way. Situated thus, drawing for his own benefit, and having no effects with the drawee, notice to him of non-payment would have been the idlest of ceremonies.

Upon the whole case, I reach these results: The defendant is not shown to be an accommodation drawer. The bill, upon its face, implies the contrary. The verdict establishes the fact that the drawee had no effects of the drawer in his hands; and this was sufficient, *prima facie*, to excuse non-notice. If there were qualifying circumstances, taking the case out of the exception and bringing it under the general rule, these are not shown, and the *onus* is on the defendant.

The judgment of the district court reversing the judgment

of the circuit court is therefore reversed, and the judgment of the circuit court affirmed.

The other judges concurred.

NECESSITY OF NOTICE OF NON-PAYMENT to maker of bill, when he has no funds in the hands of the drawee: *Walker v. Rogers*, 89 Am. Dec. 348, and *note*.

IT IS DUTY OF MAKER OF NOTE to keep on hand at the place of payment funds sufficient to pay the same, or otherwise provide for payment, at maturity; and upon failure to do so, he is not entitled to notice of dishonor: *Donnell v. Lewis County Savings Bank*, 80 Mo. 172, citing the principal case.

MURPHY v. WILSON.

[44 MISSOURI, 312.]

PARTY CANNOT DECLARE UPON ONE CAUSE OF ACTION and recover upon another; but the variance between allegations and proof, to be fatal, must be such as to mislead the adverse party to his prejudice in maintaining his action or defense upon its merits.

WHERE PARTIES JOINTLY ENGAGE IN UNLAWFUL ACT, they are jointly or severally liable from injury to a third party resulting therefrom, if caused by any of the parties to the unlawful act; therefore, where parties engage in mutual combat with pistols in a street, and an innocent passer-by is injured, all of the combatants are liable.

WHERE INJURY RESULTS TO INNOCENT THIRD PERSON from a mutual combat between parties, the latter are all principals, and all liable, either jointly or severally.

THE opinion states the facts.

Hill and Oliver, for the plaintiff in error.

McFerran and Vories, for the defendants in error.

By Court, WAGNER, J. The petition in this case states that on or about the twenty-ninth day of August, 1866, in the county of Caldwell, in the state of Missouri, and in a public street in the town of Breckenridge, the defendants, the Wilsons, together with Reese Tunks, Daniel Stubblefield, Henry Turpin, and others, unlawfully and without leave, and wrongfully, made an assault on the plaintiff; and that Perry K. Wilson, one of the defendants, then and there shot and discharged a pistol loaded with powder and leaden bullets at and against the said plaintiff, and thereby, then and there, with the leaden bullet, struck and wounded the plaintiff; that Humphrey Wilson, Levi Watson, Reese Tunks, Daniel Stubblefield, and Henry Turpin, and other persons unknown to

plaintiff, were, at the time of said shooting, present, aiding, abetting, comforting, assisting, and maintaining the said Perry K. in shooting and wounding the plaintiff.

The answer of the defendants denied all the material allegations set out in the petition. The evidence, in substance, shows that a difficulty occurred in the town of Breckenridge at the time mentioned in the petition, between the defendants, the Wilsons, with some others, on one side, and Tunks, Stubblefield, and others on the other side. There were two engagements, and the parties fought with pistols. In the first encounter the Wilsons drove off their opponents. They then formed in a line across the public street, flourished their pistols, abused the opposite party, and dared them to a renewal of the combat. The other side then rallied, and another fight ensued, which was kept up for several minutes, during which sixty or seventy shots were fired; and in the last contest the plaintiff, whilst peaceably walking along the street, taking no part in the difficulty, was shot and dangerously wounded. The evidence does not disclose, with any certainty, by which side the shot was fired that hit him.

Upon the trial in the circuit court, the plaintiff asked an instruction, in effect that if the jury believed that at the time mentioned the defendants, or either of them, assaulted Tunks, Stubblefield, and others; and if, from the situation of the street, the number of persons, or other cause, said assault and firing of pistols was of such a character as to endanger or expose to injury persons passing on the street, and the plaintiff was wounded while passing on the street, without any fault on his part; and if the defendants aided and abetted each other in said assault or assaults and firing of pistols, they are all liable, provided the shot that wounded the plaintiff was then and there fired by the defendants, or by some person or persons aiding and abetting the defendants, *or returning the fire of defendants, or the fire of those aiding and abetting the defendants*, although the wounding of the plaintiff may have been accidental, and not intended by the defendants, or either of them, or persons aiding them or returning their fire, — they should then find for the plaintiff.

This instruction the court modified by striking out the words italicized, and then gave it. To which action of the court the plaintiff excepted. At the request of the defendants, the court instructed that, unless the jury found from the evidence that the defendants, or some one of them, or some other person

who was present, with whom defendants were acting in concert, aiding and assisting, shot the plaintiff, they must find for the defendants.

The court further instructed the jury that if they believed from the evidence that the plaintiff was shot by some person engaged in hostile combat against the defendants, and trying to shoot them, or some one of them, they must find for the defendants. To these instructions the plaintiff objected; and upon his objections being overruled, he took a nonsuit, with leave to move to set the same aside; and after an unsuccessful motion to have the same set aside, the cause was removed to the district court, where the judgment was reversed, and the defendants brought error to this court.

It is contended by the learned counsel for the defendants (plaintiffs in error in this court) that the action of the circuit court, in striking out that part of the plaintiff's instruction hereinbefore referred to, was right, because it sought to recover on a cause of action not made by the pleadings.

This court has heretofore decided that a party cannot declare upon one cause of action, and recover judgment upon another and entirely different cause. Notwithstanding the exceeding liberality of the practice act, we do not think it was intended to apply to such a radical and complete change. When the variance between the allegation in the pleading and the proof is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment, without costs: Gen. Stats. 1865, c. 168, sec. 2.

By section 1 of chapter 168, it is declared that no variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon its merits. Now, the averment in the petition is, that the defendants, together with Tunks, Stubblefield, and others, made the assault, and were all engaged in the commission of the offense, though it is alleged that Perry K. Wilson did the shooting.

It is unquestionably a rule of good pleading, under the code, that "every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred; and every such averment must be understood as meaning what it says, and consequently is one to be sustained by evidence which corresponds with its meaning."

Whether the pleading in this case can be considered good will depend greatly on the liability of the defendants. If, as counsel for defendants contend, they can only be held liable for their own immediate acts, or the acts of those who acted in concert with them, then the case does not correspond with the averments in the petition. If, however, the position of the plaintiff's counsel be tenable,—that the defendants are the instigators and active promoters of the riot, and that they are therefore responsible for all injury that occurred by the act of any of the participants therein,—the petition contains a sufficient allegation; and must be held good.

In general, it may be laid down as a correct proposition that every person is liable for the direct, natural, and probable consequence of his own act. If a person puts in motion a dangerous thing, as letting loose a dangerous animal, and leave to hazard what may happen, and mischief ensues, he will be regarded as a trespasser, and held answerable. Every one doing an unlawful act is considered as the doer of all that follows. If two persons mutually engage in mortal combat, or fight a duel in the public streets, and a passer-by is hit, though unintentionally, both will be held guilty as principals. As showing the settled law on the subject, where it is sought to charge an individual for the acts of others, it will be well to refer to a few of the more prominent cases.

The case of *Scott v. Sheppard*, 2 W. Black. 892, S. C., 3 Wils. 403, S. C., 1 Smith's Lead. Cas. 466, is a strong instance of the responsibility of an individual who was the first, though not the immediate, agent in producing an injury. Sheppard threw a lighted squib composed of gunpowder into a market-house, where a large concourse of people were assembled. It fell upon the standing of Yates, and to prevent injury it was thrown off his standing across the market, when it fell upon the standing of Willis; from thence, to save the goods of the owner, it was thrown to another part of the market-house; and Ryall, to avert danger, again gave it motion and new direction, and in so throwing it it struck the plaintiff in the face, and, bursting, put out one of his eyes. It was decided by the court that Sheppard was answerable in an action of trespass and assault and battery. Dr. Grey, C. J., held that throwing the squib was an unlawful act, and that, whatever mischief followed, the person throwing it was the author of the mischief. All that was done subsequent to the original throwing was a continuation of the first force and first act.

In *Vandenburgh v. Truax*, 4 Den. 464 [47 Am. Dec. 268], the defendant, having had a quarrel with a boy in the street in a city, took up a pick-ax and followed him into the plaintiff's store, whither he fled; and in endeavoring to keep out of defendant's reach, the boy ran against and knocked out the faucet from a cask of wine, by means of which a quantity of the wine ran out and was wasted. It was held that the defendant was liable to the plaintiff for damages; that where one does an illegal or mischievous act, which is likely to prove injurious to others, he is answerable for the consequences which may directly and naturally result from his conduct, though he did not intend to do the particular injury which followed.

The case of *Guille v. Swan*, 19 Johns. 381 [10 Am. Dec. 234], was this: Swan sued Guille in a justice's court, in an action of trespass, for entering his close, and treading his roots, vegetables, etc., in a garden in the city of New York. The facts were, that Guille ascended in a balloon in the vicinity of Swan's garden, and descended in his garden. When he descended, his body was hanging out of the car of the balloon in a very perilous situation, and he called a person at work in Swan's field to help him, in a voice audible to the pursuing crowd. After the balloon descended, it dragged along over potatoes and radishes, over thirty feet, when Guille was taken out. The balloon was carried to a barn at the farther end of the premises. When the balloon descended, more than two hundred persons broke into Swan's garden through the fences, and came on his premises, beating down his vegetables and flowers. The damage done by Guille with his balloon was about fifteen dollars, but the crowd did much more. The plaintiff's damages in all amounted to ninety dollars. It was contended before the justice that Guille was answerable only for the damages done by himself, and not for the damages done by the crowd. The justice was of the opinion, and so instructed the jury, that the defendant was answerable for all the damages done to the plaintiff. The jury accordingly found a verdict for him for ninety dollars, on which the judgment was given, and for costs. On error in the supreme court, it was argued by the counsel for the plaintiff in error that the injury committed by Guille was involuntary, and that done by the crowd was voluntary, and that therefore there was no union of interest; and that upon the same principle that would render Guille answerable for the acts of the crowd in treading down and destroying the vegetables and flowers of

Swan, he would be responsible for a battery or a murder committed on the owner of the premises. But the court, by Chief Justice Spencer, said: "The intent with which an act is done is by no means the test of the liability of a party to an action for trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong. It was so decided, upon a review of all the cases, in *Percival v. Hickey*, 18 Johns. 254 [9 Am. Dec. 210]. Where an immediate act is done by the co-operation or the joint act of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear that they either acted in concert, or that the act of the individual sought to be charged ordinarily and naturally produced the acts of the others." And it was accordingly adjudged that Guille was answerable for the acts of the crowd, and the judgment of the justice was affirmed.

In the case of *Thomas v. Winchester*, 6 N. Y. 397 [57 Am. Dec. 455], it was declared that a dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label. The liability of the dealer in such cases arises, not out of any contract or direct privity between him and the person so injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reached the hands of the persons injured.

It will be seen in the foregoing cases that the injuries received by the plaintiffs were not the necessary consequences of the wrongs done by the defendants. But in every instance the wrong was of such a nature that it might very naturally result in an injury to some other person.

In the case of *Vosburgh v. Moak*, 1 Cush. 453 [48 Am. Dec. 613], the plaintiff was driving with a one-horse wagon along a public highway, where the defendants and others were playing a game of wicket; and while so passing, the plaintiff was struck in the pit of the stomach and much injured by the ball which the players were using. At the time of the accident, Hollenback, one of the defendants, whose part in the game

was to catch the ball after it had been struck, and to throw it back to the person whose business it was to roll it, was stationed in a northeasterly direction from the latter, whose station was at one of the wickets. The plaintiff had passed the wicket a little, and was west of a direct line from Hollenback to the person at the wicket. At this moment Hollenback threw the ball, with an intention to throw it to the person at the wicket; but the ball being wet, it slipped in his hand when he was in the act of throwing it, and was then turned from its intended direction, and struck the plaintiff, as already stated. The other defendants were engaged in the game with Hollenback; but they had no other connection with him in the act of throwing the ball.

The defendants requested the court to instruct the jury that if they should be satisfied that Hollenback designed to throw the ball to one of the other players, that it was thrown with such design, and slipped in his hand, that by accident on his part he hit the plaintiff, and that the other defendants had nothing to do with the throwing of the ball in this particular instance, although engaged in the general play, then such other defendants would not be responsible for the injury occasioned by the accident.

This instruction was refused, the court holding that if several persons engaged in playing a game of ball in the public highway, and a traveler lawfully passing thereon was accidentally struck by the ball, all persons so engaged were liable in trespass, provided that, from the width of the road and the number of persons usually passing thereon for the ordinary purposes of travel, the game was of such a character as to be likely to endanger the safety of travelers and passengers, and that the individual by whom the ball was thrown was acting in the usual manner of persons engaged in such game.

Here it will be seen that the doctrine is laid down that there was an association of persons engaged in a common object, and that an injury inflicted by one individual, without the intentional concurrence on the part of the others, or even without intention on the part of the individual who inflicted the injury, rendered the whole number engaged jointly liable for the damages sustained by the injured party. They engaged in playing a game of ball on a public highway, where travelers were accustomed to pass, and had a lawful right to pass; and the happening of the event which caused the injury was a contingency which was one of the probable and natural results of their acts.

In the present case, the parties were all engaged in violating the law and disturbing the public peace. They showed an utter disregard for the safety of the community and the lives of individuals. In the most public place of a street in a town, where people were passing by, they engaged in an open fight, firing their pistols in every direction. All the participants were guilty, and all responsible for whatever damages flowed from their outrageous acts. The evidence is very clear that defendants induced, brought on, and caused the last encounter, during which the plaintiff was injured; and the wounding of innocent persons on the streets, where sixty or seventy pistol shots were fired by men wrought up to the highest pitch of excitement, was nothing but a probable and natural consequence. But had the defendants not been the aggressors, so far as responsibility is concerned, the case would in no wise be altered. Had the parties all met at the same time, and by mutual understanding arranged themselves on different sides and engaged in conflict, they would have all been jointly and severally liable for all damages that occurred.

It was not material whether the defendants in this action fired the shot that did the mischief, or whether it was fired by some one else participating in the desperate fight. They were all alike amenable, and might be sued, either jointly or separately. On either ground, — that individuals are liable for the acts of others when those acts are produced by them, or that, when injury results from mutual combat or association, all are principals, and all are liable, — I think the action is maintainable, and that the judgment of the district court should be affirmed.

Affirmed.

The other judges concurred.

PARTY CANNOT SET UP ONE CAUSE OF ACTION and recover upon an entirely different one: *Dougherty v. Matthews*, 88 Am. Dec. 126, and note; *Turner v. Walker*, 22 Id. 329; but the variance, to be fatal, must be such as misleads the opposite party to his prejudice: *Catlin v. Gunter*, 62 Id. 113, and note 119; *Dubois v. Beaver*, 82 Id. 326.

WHERE TWO OR MORE PERSONS engage in the commission of an unlawful act, they are each and all criminally responsible for the consequences which flow from it: *Commonwealth v. Campbell*, 83 Am. Dec. 705, and note 712; *Commonwealth v. Gannett*, 79 Id. 693, and 694. All are guilty as principals: *Hawkins v. State*, 58 Id. 517; *Inhabitants of Lowell v. Boston etc. Corporation*, 34 Id. 35.

STATE v. MEAGHER.

[44 MISSOURI, 356.]

WHEN TRUST FUNDS ARE STOLEN while in the hands of an executor or administrator, he is, in equity, exonerated from liability, and is from necessity a competent witness in his own behalf. In such case an equitable defense may be made in an action at law, a jury being substituted in the place of the chancellor.

EXECUTORS AND ADMINISTRATORS are subject to liability only for want of due care and skill, and the measure required of them is the same demanded of bailees for hire, or that which prudent men exercise in the direction of their affairs.

CARE REQUIRED OF EXECUTOR OR ADMINISTRATOR as to the property in his possession must be graduated according to its character, its value, and the convenience of its being made secure, the facility for its being stolen, and the temptations thereto.

• **THE** opinion contains the facts.

Vories and Vories, for the plaintiff in error.

Harlan, and Kelly and Giddings, for the defendant in error.

By Court, CURRIER, J. In February, 1866, the Andrew County court granted letters of administration on the estate of Robert M. Cowan, deceased, to the defendant Meagher, who executed his bond as administrator, with the other defendants as sureties, for the performance of his duties in that relation. He thereupon assumed charge of the estate, and disposed of so much of it as to realize the sum of \$1,807.50. On the 15th day of October following, his letters of administration were revoked, and the plaintiff, Townshend, as public administrator, was put in charge of the estate. This suit is brought upon the administration bond to recover the balance of moneys alleged to remain in the hands of the outgoing administrator.

The answer admits the receipt of the \$1,807.50, as charged in the petition, but alleges, in the way of defense, that \$1,700 of said money was forcibly stolen and taken from the possession of said Meagher, about the 9th day of September, 1866, by thieves, without his fault or neglect, and which said theft he could not prevent.

The replication puts the allegations in regard to the seventeen hundred dollars in issue, and upon these issues the trial was had.

On the trial, Meagher was offered as a witness in his own behalf, and was excluded by the court, exception thereto being

taken. An exception was also taken to one of the instructions given for the plaintiff, in whose favor the trial resulted.

Going back of the questions at the trial, however, the counsel of the plaintiff has insisted, in this court, that the facts alleged in the answer constitute no defense to the suit; that an administrator can alone be discharged from the obligation of his bond by producing the property or paying over the money that has come to his hands. In support of this view, we are referred to a number of authorities, such as *United States v. Prescott*, 3 How. 578, where the suit was upon the bond of a public officer holding public funds, and where it was held that the obligation of the bond was absolute, and that nothing short of the actual paying over of moneys which came to the possession of the officer would satisfy that obligation.

The obligation of the bond in suit is clearly different from that, for it is well-established equity law that, under certain circumstances, executors and administrators are absolved from responsibility, notwithstanding the bond, and notwithstanding the failure to produce the property or pay over its value in money,—as where the property has been taken by the public enemy, or has been lost through unavoidable accident, or, in case of animals, where they have perished from disease,—no negligence being imputable to the administrator or executor: 2 Williams on Executors, 142, and cases there cited. The obligation of the bond, therefore, in such cases is not absolute.

The condition of the bond under consideration is, that the administrator shall pay over and account for the money and property that should come to his hands, belonging to the estate, as “required by law”; and the question remains, In a case like the present, what does the law require? In *Cross v. Smith*, 7 East, 251, Lord Ellenborough, C. J., holds the following language: “As no case at law has yet decided that an executor, once become fully responsible by actual receipt of a part of the testator’s property for due administration, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of a testator’s assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees in case of loss without any negligence on their part,—I say, as no such case in respect to exec-

utors has yet occurred in a court of law, we are not, from the particular hardship of the present case, authorized to make such a precedent in favor of the defendant." This was in 1806; and I find no subsequent case, English or American, where such precedent has been established in a court of law.

The rule in equity is different, however, as is shown by a long and uniform course of decision, although but few of them involve the particular question of the loss of money by theft or robbery. In *Forman v. Coe*, 1 Caines, 96, it is assumed that robbery of trust funds in the hands of an executor, in equity, exonerates him from accountability; and that he is, from the necessity of the case, a competent witness in his own behalf. This was a case of robbery, as distinguished from theft, committed by a company of soldiers, on Long Island, in the time of the war of the Revolution.

Redfield, in his work on wills, part 2, page 881, states the law in regard to the robbery of trust funds thus: "If the trustee is robbed of the trust money without his fault, he is not responsible; and he may, in ordinary cases, exonerate himself by his own oath, as he cannot be expected to produce any other proof." *Morley v. Morley*, 2 Ch. Cas. 2, *Knight v. Lord Plimpton*, 3 Atk. 480, and *Jones v. Lewis*, 2 Ves. 240, are cited as authorities supporting the text.

In the *Morley* case, the defendant was trustee for the plaintiff, an infant, and received for him forty pounds in gold, of which he was robbed by his own domestic servant, together with two hundred pounds of his own money. The lord chancellor allowed the trustee this forty pounds on his own oath: See 3 Chitty's Eq. Dig. 2934. This would seem to have been a case of theft, technically, although it is spoken of as a robbery. The case in *Atkyns* does not involve the question of theft or robbery, but a question of care and prudence in remitting funds to London by a court receiver, in bills of exchange.

The facts in the case reported in 2 Vesey were, that the administratrix had placed certain goods in the hands of her solicitor, from whom they were stolen. In regard to the case, Lord Chancellor Hardwicke said: "It is certain that if a bailee of goods, against whom there is an action of account at law, loses the goods by robbery, that is a discharge in an action of account at law; and it is proved (and I think reasonably) that if a trustee is robbed, that robbery, properly proved, shall be a discharge, provided he keeps them so as he

would his own. So it is as to an executor or administrator, who is not to be charged further than goods come to his hands, and for these not to be charged unless guilty of a *devastavit*; and if robbed, and he could not avoid it, he is not to be charged, at least not in this court."

In 2 Williams on Executors, 1419, 1420, it is said: "But it should seem, at least in a court of equity, that an executor or administrator stands in the condition of a bailee, with respect to whom the law is, that he should not be charged without some default in him. Therefore, if any goods are stolen from the possession of the executor, or from the possession of a third person to whose custody they were delivered by the executor, the latter shall not, in equity, be charged with these as assets." *Jones v. Lewis*, 2 Ves. 240, and other authorities are cited in support of that doctrine; see also page 1538. So in the Law of Trusts and Trustees, by Tiffany and Bullard, page 583, the principle is stated thus: "Where an executor has been robbed of money belonging to the estate, without any fault of his own, he will not be held responsible." The result is, that executors and administrators, according to the decided cases and the views of eminent law-writers, stand in the position of trustees of the persons who are interested in the estates upon which they administer, and that they are subject to liability only for want of due care and skill, and that the measure of care and skill required of them is the same as that demanded of bailees for hire, namely, that which prudent men exercise in the direction of their affairs. To exonerate this class of trustees from liability on the ground of the theft or robbery of trust funds in their hands, might at first seem to hazard the just security that ought to be thrown around estates, and to facilitate fraudulent practices on the part of corrupt executors and administrators. The experience, however, of the last hundred years, in this country and England, does not indicate that the rule works injuriously in this direction, or that it serves to induce cases of simulated theft or robbery. It is quite remarkable that so few cases have arisen where questions of this character have come up for adjudication. Besides, the holding of trustees to responsibility for trust funds in a plain case of theft or robbery, against which the watchfulness of a prudent man could not guard, would have a tendency to deter men of prudence and care from assuming such relations and responsibilities,—thus leaving these funds to fall into the hands of less care-

ful and scrupulous persons, and to a consequently increased hazard. On the whole, we are disposed to accept the law as laid down in the adjudicated cases referred to as satisfactory.

Under our system of practice, an equitable defense, which this is, may be made to an action at law. The change of system in this instance leads to a change of the trier of the questions of fact involved, substituting a jury in place of the chancellor; and what is due diligence is frequently more a matter of fact than a question of law. Practically, therefore, the relief, which in a case like the present has been confined to a court of chancery, to be adjudged and disposed of according to the rules and principles of equity practice, is transferred to a court of law, involving a jury trial. But this circumstance does not warrant a modification of the existing rules governing the accountability of executors and administrators in respect to trust funds alleged by them to have been lost by theft or robbery through no fault of theirs.

On looking into the evidence preserved in the record in this case, it appears that the money alleged to have been stolen was placed by the defendant Meagher in his pocket-book, and thus deposited in a drawer of a bureau standing in a vacant room of the house where he resided, the room being but indifferently secured against the entrance of burglars. It also appears that thieves were infesting that part of the country at that time. Under such circumstances, the leaving of a considerable sum of money in the situation stated is suggestive rather of culpable negligence than a high degree of care and prudence. It might be prudent enough to leave ordinary apparel in that situation. The fact, however, that the property in question was not clothing, but money, changes the character of the case. That which would be ordinary care in the security and preservation of wearing apparel might be gross carelessness in the disposition of bank bills. The care must be graduated according to the character of the property, its value, and the convenience of its being made secure, the facility for its being stolen, and the temptations thereto: Story on Bailments, secs. 15, 186, and cases cited. Under the civil law, the fact of theft was itself deemed presumptive evidence of carelessness or fraud on the part of the bailee of the lost property.

The foregoing exposition of the law governing the liability of executors and administrators, in reference to the trust funds in their custody, disposes of the objection urged against the

sufficiency of the defense set up in the answer, and also incidentally, of the objection taken to the competency of Meagher as a witness, which is the other principal point in the case; since, as we have seen, parties situated as he is are permitted to testify in their own behalf from the supposed necessity of the case, independently of any statutory regulation on the subject. But Meagher is a competent witness by virtue of the provisions of the statute: Gen. Stats. 1865, p. 586, sec. 1. It was the manifest purpose of the legislature, in this enactment making parties witnesses, to preserve as far as practicable an equality of position between them. Therefore the living were not permitted to testify in respect to acts and transactions had with persons since deceased, or who had become insane; and for the reason that the testimony of the opposing party to the transaction, or cause of action, or matter of defense, could not be had. This, indeed, runs through the entire proviso, including both exceptions, and constitutes the entire scope and substance of it. In cases where the testimony of one of the parties to the transaction, or cause of action, or matter of defense, was placed beyond reach by the causes stated, the legislature very wisely shut out the testimony of the other party; and for that and no other reason. That seems evident on the face of the statute. In respect to the defense set up in this suit, there is no loss of testimony through death, or insanity, or other causes contemplated in the enactment. Meagher is clearly not within the reason of the exception, and he is not excluded from testifying because of it. As his testimony was improperly ruled out, the case must go back for a fresh trial. The instruction excepted to is subject to verbal criticism, although it puts the law to the jury with substantial accuracy.

The judgment of the district court reversing the judgment of the circuit court is therefore affirmed, and the case remanded for trial in accordance with this opinion.

The other judges concurred

TRUSTEES ARE NOT LIABLE FOR LOSS of trust funds occurring through theft, robbery, etc., and when so lost they are competent witnesses in their own behalf: Note to *Seawell v. Greenway*, 75 Am. Dec. 799-800; *State v. Powell*, 67 Mo. 397; *Fudge v. Durn*, 51 Id. 267, both citing the principal case.

EXECUTORS AND ADMINISTRATORS ARE LIABLE only for want of due care and skill, the measure of which is that exercised by prudent men in the man-

agement of their own affairs: *Van Bibber v. Julian*, 81 Mo. 626; *Merritt v. Merritt*, 62 Id. 157, both citing the principal case.

WHEN MONEY JUDGMENT IS ASKED and that is met with an equitable defense, a jury trial is proper: *Smith v. St. Louis B. C. Co.*, 14 Mo. App. 527, citing the principal case.

GRUMLEY v. WEBB.

[44 MISSOURI, 444.]

AGENT OR OTHER PERSON ACTING IN FIDUCIARY CAPACITY cannot speculate for his gain, and to the prejudice of his principal, in the subject-matter committed to his care.

TRUSTEES ARE INCAPABLE OF PURCHASING TRUST PROPERTY for themselves. ONE WHO UNDERTAKES TO COLLECT RENTS AND EXERCISE CONTROL OVER PROPERTY occupies a fiduciary relation which forbids his placing himself in antagonism to his principal with respect to such property.

ONE ENABLED TO BID IN PROPERTY AT LESS THAN ITS VALUE, by falsely representing that he is acting for or in the interest of the defendant in execution, will be converted into a trustee for the benefit of such defendant.

RENEWAL OF LEASE given to the agent or trustee of the holder of the original lease is held for the benefit of the latter, who may compel its assignment to him, and an accounting for the profits received therefrom.

"RELEASE OF ALL DEMANDS discharges all sorts of actions, rights, and titles, conditions before or after breach, executions, appeals, rents, covenants, annuities, contracts, recognizances, statutes, commons," etc.

GENERAL WORDS in a release, following a particular recital, are qualified by and limited to such recital.

RECEIPT FOR SUM DESIGNATED as in satisfaction of a certain judgment, and containing the following clause: "And said sum is in full satisfaction of all claims and demands I have or hold against said B. and W., or either of them, up to this date," — will be confined in its effect to the judgment therein named, and not permitted to release another action then pending between the same parties.

THE opinion states the facts.

Myers, Oliver, Cline, Jamison, and Day, for the appellant.

Krum, Decker, and Krum, for the respondent.

By Court, WAGNER, J. This was a bill in equity to have a renewed lease, procured by the defendant while agent of the plaintiff, declared a trust for the plaintiff, and for an account. The record shows that the plaintiff leased from John O'Fallon an unimproved lot of ground, in 1844, and in 1855 completed the building of fifteen houses on it. The lease was to expire January 1, 1864, with a privilege in plaintiff of removing his improvements at any time before its expiration. Just before completing the building of the houses, the plaintiff, by a

power of attorney, made defendant, who was in the real estate business, his agent to collect the rents and manage his property, and then departed for Europe. While plaintiff was absent, the defendant, his agent, bought in three judgments for himself, which were outstanding against the plaintiff. Upon these judgments he caused executions to be issued, had the fifteen houses levied on, and sold at sheriff's sale, and bought them in himself, taking a deed therefor, while plaintiff was absent in Europe. The sale was made in January, 1857, and the evidence is uncontradicted that bidders were kept away, and competition warded off, by defendant's declaring that he was purchasing the buildings for his principal, the plaintiff. The buildings were purchased at sheriff's sale, and, as the evidence shows, for less than a tenth of their real value. The defendant stated on different occasions that he purchased the buildings for the plaintiff, but it seems that he really bought them for himself, with the intention of keeping them; and when plaintiff, on hearing of the sale, returned home, he refused to give him any account of the rents of the houses, except up to the time of the sheriff's sale to him. Plaintiff then sued defendant, as his agent, for an account, and in May, 1864, recovered a judgment for \$11,522.54, for rents collected and appropriated by defendant up to January 1, 1864, the date that the lease expired.

In the month of November, 1863, and before the expiration of the lease, both parties (the plaintiff and defendant) applied to the lessor for a renewal of the lease. The lessor, O'Fallon, refused to continue the lease to the plaintiff, but granted a lease of the premises for ten years, from January 1, 1864, to the defendant; and he has ever since enjoyed the rents and profits of the lot, together with the buildings thereon erected by the plaintiff.

O'Fallon is dead, but the testimony of Keber, his chief clerk, a disinterested witness, states that he knew of no objection to the plaintiff, but that O'Fallon made it a rule to grant a new lease to the one already in possession. The defendant was in possession to the exclusion of his principal, the plaintiff. He exhibited his deed to show title, and it is charged that he made use of his wrongful possession and pretended title to acquire his lease.

After the procurement of this lease by the defendant, and at the September term, 1864, of the St. Louis circuit court, the plaintiff brought suit against the defendant for seven thousand

dollars, in which he set up that under the first lease he had a right to remove the improvements at any time before the 1st of January, 1864, and that the defendant refused to let him remove them after that date, thereby damaging him in the above amount, for which he asks judgment. A demurrer was filed, and sustained to this last petition. While this last suit was pending, and the prior judgment remained unsatisfied, negotiations were entered into for a compromise. It appears that an appeal was taken from the judgment as rendered, and it was agreed by the attorneys on both sides that there was a mistake in the calculation as to amount, and that it was rendered for too much. They finally agreed on six thousand five hundred dollars, and the plaintiff executed to the defendant the following receipt:—

“Received from William G. Webb six thousand five hundred dollars, which is in full satisfaction of a judgment recovered by me against said Webb and David S. Bigham in the St. Louis circuit court; and said sum is in full satisfaction of all claims and demands I have or hold against said Bigham and Webb, or either of them, up to this date.

(Signed)

“WILLIAM GRUMLEY.

“St. Louis, March 7, 1865.”

It should be stated that Bigham was in partnership with defendant Webb in the real estate business when the plaintiff intrusted his business to their care, but they dissolved partnership before plaintiff's return from Europe, and the whole matter passed into the hands of the defendant, who alone was sued in this suit.

Upon the facts as above set forth, the case was heard in the court below, and the bill dismissed for want of equity.

It is contended by the counsel for the plaintiff that the defendant, at the time he acquired the lease, stood in a fiduciary capacity, and was disabled from taking and holding the same on his own account, and that it inured in equity to plaintiff's benefit. Defendant's counsel insists that the lease in controversy did not inure to the benefit of the plaintiff upon its procurement, and that if it did, the receipt shows a settlement of all matters in difference between the parties, and includes this as well as all other claims. Nothing is better settled than that an agent or a trustee, or any person acting in a fiduciary capacity, cannot speculate for his private gain with the subject-matter committed to his care, to the prejudice of his principal. He cannot be allowed to purchase an interest in

property where he has a duty to perform which is inconsistent with the character of purchaser. The law does not presume that such a transaction will always be impressed with fraud, but it furnishes an inducement to fraud, and affords opportunities to persons, who should always act with the most conscientious and scrupulous good faith, to abuse their trust; and therefore a total disability is enjoined, to take away all temptation: *Jamison v. Glascock*, 29 Mo. 191; *Boardman v. Florez*, 37 Id. 559; *Jacques v. Edgell*, 40 Id. 77; *Thornton v. Irwin*, 43 Id. 153; *State etc. v. McKay*, 43 Id. 594.

Lord St. Leonards, in his work on vendors and purchasers, lays down the rule with great clearness. He says: "It may be laid down as a general proposition that trustees, who have accepted the trust (unless they are nominally such to preserve contingent remainders), agents, commissioners of bankrupts, assignees of bankrupts or their partners in business, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who, being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will be shortly mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest*": Sugden on Vendors and Purchasers, 13th ed., 566.

In New York it has been decided that the clerk of a broker employed to make sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter that if he becomes the purchaser he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land: *Gardner v. Ogden*, 22 N. Y. 325 [78 Am. Dec. 192].

That the defendant in this case occupied a relation of trust and confidence toward the plaintiff is undisputed. For a certain remuneration he undertook to collect the rent and exercise control over the property. His principal was absent, and relied entirely on his discretion, judgment, and integrity. Under such circumstances, he had no right to interfere with the title to the property, or place himself in an attitude of

antagonism to the interests of his principal. But this is not all. It was expressly agreed that the rents, as they were collected, after paying taxes and ground-rent, should be applied to the payment of the judgments. But instead of pursuing this course, the defendant, as agent, purchases up the judgments, has them assigned to him, orders out execution, and buys the property in his own name; this, too, while the plaintiff was in Europe, relying on the defendant's honesty and diligence to protect his rights. That the deed was taken in the defendant's name, and that he afterward refused to account for rents beyond the time that he acquired the deed, show that the purchase was made *ex maleficio*. Had there been no agency under the facts in this case, the defendant would still have been placed in the position of a trustee. He obtained the property at a sacrifice, by representing that he was buying for his principal; and no principle is clearer than that where one becomes a purchaser under such circumstances as would make it a fraud to permit him to hold on to his bargain,—as by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtains it at a sacrifice,—courts will relieve against such fraud, and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby: *McNew v. Booth*, 42 Mo. 189, and cases referred to.

We think, then, the proposition may be fairly stated that at the time the purchase was made at sheriff's sale the defendant was disabled from acting on his own account, and that for whatever he did he will be held liable as a trustee.

When he acquired the lease from O'Fallon he was dealing as a trustee; and he obtained a renewal of the lease of his *cestui que trust* in his own name before the lease had expired; and the evidence leaves no room to doubt that the possession and title which he had got by reason of his being agent or trustee were the agencies which superinduced the execution of the lease to him.

A uniform series of decisions, both English and American, have adjudged that under such circumstances the trustee cannot take the lease to himself; and if he does, he will be obliged to assign it to the *cestui que trust*, and account for the profits. The leading case on this question is *Keech v. Sandford*, Selwyn's Cases in Chancery, 61, which was tried in 1726, before Lord Chancellor King. In that case, a person being

possessed of a lease of the profits of a market, devised his estate to a trustee in trust for the infant. Before the expiration of the term the trustee applied to the lessor for a renewal for the benefit of the infant, which he refused, in regard that, it being only of the profits of the market, there could be no distress, and must rest singly in covenant, which the infant could not do.

There was clear proof of the refusal to renew for the benefit of the infant, and the trustee then got a lease made to himself. Bill was brought by the infant to have the lease assigned to him, and for an account of the profits, on the principle that wherever a lease is renewed by a trustee it shall be for the benefit of the *cestui que use*. This principle was not denied in the argument for the trustee, but it was endeavored to be avoided on the ground of the express refusal of the lessor to renew to the infant. But the lord chancellor said: "I must consider this as a trust for the infant, for I very well see that if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*. Though I do not say there is fraud in this case, yet he [the trustee] should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed; 'for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestui que use*.' "

And a decree was accordingly entered that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenant comprised in the lease, and that an account should be taken of the profits made after the renewal.

Keech v. Sandford, *supra*, sometimes called the *Rumford Market Case*, is cited by the learned authors of the leading cases in equity (see *White & Tudor's Lead. Cas. Eq.* 36) as the leading authority on the doctrine of constructive trusts arising upon the renewal of a lease by a trustee or executor in his own name and for his own benefit.

The rule inflexibly laid down by Lord King has been invariably followed; namely, that a lease renewed by a trustee or executor, in his own name, even in the absence of fraud, and upon the refusal of the lessor to grant a new lease to the *cestui que trust*, shall be held upon trust for the person entitled to

the old lease. For this position the authors cite the following cases: *Fitzgibbon v. Scanlan*, 1 Dow, 261, 269; *Rawe v. Chichester*, 1 Amb. 715; 1 Bro. C. C. 198; 2 Dick. 480; *Pickering v. Voules*, 1 Bro. C. C. 198; *Pierson v. Shore*, 1 Atk. 480; *Nesbitt v. Tredennick*, 1 Ball & B. 46; *Abney v. Miller*, 2 Atk. 597; *Edwards v. Lewis*, 3 Id. 538; *Killick v. Flexney*, 4 Bro. C. C. 161; *Moody v. Mathews*, 7 Ves. 174; *James v. Dean*, 11 Id. 383; *Parker v. Brooke*, 9 Id. 583; *Lovatt v. Knipe*, 12 Ired. Eq. 124; *Walley v. Walley*, 1 Vern. 484; *Holt v. Holt*, 1 C. C. 190.

The reason assigned for decreeing renewals by trustees and executors, to inure to the benefit of the *cestui que trust*, is public policy, to prevent persons in such situations from acting so as to take a benefit for themselves: *Griffin v. Griffin*, 1 Schoales & L. 354, *per* Lord Redesdale; *Blewett v. Millet*, 7 Brown Parl. C., Toml. ed., 367.

The same doctrine applies to partnerships, where one partner obtains a renewal of a partnership lease for his own benefit, and to a person having a limited interest in a renewable lease, as a tenant for life. If he renews it in his own name, he will be held trustee for those entitled in remainder in the old lease.

In American jurisprudence the principle is equally as well settled as in England. In an early day, the ablest of all American chancellors (Kent) gave the subject a thorough and profound discussion, and fixed the rule on a strong basis. It would too much extend the length of this opinion to attempt a review of the American authorities, but they will be found collated by the American editors, Hare and Wallace, in a note to *Keech v. Sandford*, above referred to.

In the case of *Zilkin v. Carhart*, 3 Bradf. 376, the intestate having owned a lease for years, without covenant of renewal, but with a stipulation that the right of the lessee to take away the building on the premises should not be impaired, and the administratrix having taken a renewal in her own name, it was held that the new lease inured to the benefit of the estate, and that the administratrix was bound to account to the next of kin, for its value and for the rents which had accrued, less the current charges, repairs, and ground-rent.

The surrogate, in his opinion, said there was always a beneficial interest connected with a tenancy as an inducement toward a renewal, which in equity was regarded as valuable; and a trustee could not avail himself of his position, and use the good-will for a renewal in his own right, in exclusion of

the parties for whom he was trustee: See also *Thomas v. Zumbalen*, 43 Mo. 471.

In general, however, where the trustee buys an estate, or renews a lease which inures to the benefit of the *cestui que trust*, he will be entitled to reimbursement for his outlay: *Quackenbush v. Leonard*, 9 Paige, 334, 344; *Mathews v. Dragaud*, 3 Desaus. 25-28; *McClanahan v. Henderson*, 2 A. K. Marsh. 388 [12 Am. Dec. 412]; *Morrison v. Caldwell*, 5 T. B. Mon. 428 [17 Am. Dec. 84]; *Kellogg v. Wood*, 4 Paige, 578.

One question alone remains to be considered, and that is, whether the receipt concludes this suit, and amounted to a final adjustment of all matters in controversy between the parties. The plaintiff alone signed the receipt, and it expressed full satisfaction of the judgment, which was the principal object of negotiation between the parties, and also of all claims and demands which the defendant had or held against the plaintiff. The language is exceedingly broad and comprehensive, but, like all other contracts, it must be interpreted and construed from existing facts, and in the light of surrounding and contemporaneous circumstances. Evidence was taken at the trial in the court below as to what was actually settled between the parties, and what was intended to be released. Some of the evidence is in conflict and irreconcilable. The opposing attorneys understand the matter differently. But upon a review of all the evidence bearing upon this point, and the statement of the parties themselves, the conclusion is irresistible that the plaintiff thought he was compromising only the judgment actually obtained, and that he was receiving satisfaction and releasing his claim to that judgment only. He had no idea that the settlement included the second suit, which was pending and undisposed of in the circuit court.

The receipt, acknowledging satisfaction of the judgment rendered, he signed; and on the same day his attorneys, on their own responsibility, and without consulting him, signed an order for the dismissal of the pending suit. It is undoubted that he was ignorant of this dismissal for some time after it occurred. On the other hand, the defendant's testimony tends to show that defendant considered the settlement a complete adjustment of all differences growing out of plaintiff's claim on defendant; but I am impelled to the belief that neither party at the time apprehended that a suit of this character would be instituted. It was not contemplated, nor thought of.

Such being the case, we must see what construction the law will place upon the terms of the receipt.

In the case of *Vedder v. Vedder*, 1 Denio, 257, where the receipt was "one dollar in full of all demands to date," Judge Beardsley quoted the language of Lord Coke, that the word "demand" was the largest word in law except "claim," and said that a "release of all demands discharges all sorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons," etc.; and as authorities to sustain this view, he cites Bac. Abr., tit. Release, I; Lit., sec. 508; Co. Lit. 291 b; *Althan's Case*, 8 Coke, 299. But the receipt in that case was simply for one dollar in full of all demands to date, nothing being said respecting the particular demand which was paid; and as it was received on an adjustment between the parties of mutual cases of tort, it was held to be binding on all cases of mutual dispute. The case, when properly examined and rightfully understood, does not militate against the universally recognized doctrine that language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter, and will be construed and limited accordingly.

In an old book of great merit it is said: "On the rule of law that every man's deed shall be taken strongest against himself, and on what is laid down in *Althan's Case*, 8 Coke, 148, *generalis clausula*," etc., "it hath been insisted that general words in a release are to be taken strongest against the releasor, and are not to be qualified or restrained by any special recital. But herein the sure rule and distinction seems to be that where there are general words all alone in a deed of release they shall be taken more strongly against the releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital": Bac. Abr., tit. Release, K.

In 2 Roll. Abr. 409, it is said that if a man receives ten pounds of another, and by his deed acknowledges the receipt thereof, and therefore releases, acquits, and discharges him of all actions, suits, debts, duties, and demands, by this release nothing is discharged but the ten pounds, and the action and demands thereof; for the last words have reference to the first, and are so limited by them.

In *Jackson v. Stackhouse*, 1 Cow. 122 [13 Am. Dec. 514], the

release given in evidence by the defendant discharged the judgment obtained against the mortgagors for two years' interest on the bond; it also contained general words, "in full of all debts, demands, judgments, executions, and accounts, of whatsoever nature, in law or equity." Notwithstanding the extensive scope of this language, the court declared that it was settled that where there were general words alone in a deed of release they should be taken most strongly against the releasor; but where there was a particular recital and then general words followed, the general words should be qualified by the particular recital. So, also, in *Littlefield v. Winslow*, 19 Me. 394, Shepley, J., in speaking on this subject, says: "Persons often use general language when speaking of the subject on which the mind is then employed. If another subject be presented to the mind in connection with it, the language usually gives some indication of it. And when it does not, if general language were not limited to the subject then under consideration, it would occasion mischiefs, not only in the common business of life, but in the construction of contracts, and even in judicial proceedings. It was so clearly perceived that the language used should be considered as applicable to the subject of thought only, that it introduced the maxim, *Sensus verborum ex causa dicentis accipiendus est et secundum subjectum materiam*": *Moore v. McGrath*, Cowp. 9, per Lord Mansfield; *Butcher v. Butcher*, 4 Bos. & P. 113; *Payler v. Homersham*, 4 Maule & S. 425; *Lyman v. Clark*, 9 Mass. 237; *McIntire v. Williamson*, Edw. Ch. 38.

It necessarily follows that the receipt furnishes no obstacle to the plaintiff's asserting his rights in this suit. The judgment will be reversed, and the cause remanded for further proceedings, to be had in conformity with this opinion.

Reversed and remanded.

The other judges concurred.

THE DOCTRINE OF THE PRINCIPAL CASE respecting the effect and construction of releases is well sustained by the authorities. If the release is a general one, not by its terms applicable to any particular demand, or if it purports to be a general release including a certain designated demand, it will be construed most strongly against the releasor, and preclude him from asserting any pre-existing demands: *Dunbar v. Dunbar*, 5 Gray, 103. If, on the other hand, a particular debt is first released, followed by general words, however comprehensive in scope and character, such general words are interpreted as relating solely to the debt or debts specifically enumerated: *Simons v. Johnson*, 3 Barn. & Adol. 175; *Jackson v. Stockhouse*, 13 Am. Dec. 514; *Payne v. Allen*, 1 Sprague, 304; *Law v. Bentley*, 25 Ill. 52; *Seymour v.*

Butler, 8 Iowa, 304; *Lyman v. Clark*, 9 Mass. 235; *Rich v. Lord*, 18 Pick. 322; *Averill v. Lyman*, 18 Id. 346.

One obtaining a renewal of a lease, while occupying a confidential relation to the original lessee, will generally be treated as acting for the latter, and compelled to assign to him: *Smith v. Smith*, 1 Harp. Ch. 160; *Burrell v. Bull*, 3 Sand. Ch. 15.

GARVIN'S ADMINISTRATOR v. WILLIAMS.

[44 MISSOURI, 465.]

REQUESTS BY WILL, GIFTS, GRANTS, OR DONATIONS obtained from the ward by the guardian, from *cestui que trust* by trustee, from child by parent, or from client by attorney, are watched with great and jealous scrutiny, and generally held to be presumptively void and obtained through undue influence.

REQUEST BY WILL FROM WARD TO GUARDIAN is presumed void, and will not be allowed to stand if the period between the making of the will and the coming of age of the ward is short, unless it is shown most satisfactorily, and beyond a reasonable doubt, that there exists the utmost good faith on the part of the guardian.

WILL OF WARD IN FAVOR OF GUARDIAN PRESUMED INVALID.—Where it appeared that the devisee had been appointed the guardian of the testator when the latter was a child; that from the time of such appointment until his death he resided in the family of the guardian; that the latter had exclusive control and management of his estate, and his entire confidence; that just prior to arriving at age, a settlement was had between them, and on the next day the ward made his will in favor of the guardian and his family, almost totally disinheriting his relatives; that at the time he was too ill to attend to business, and showed no interest in what was going on, and about a month afterwards died,—it was held that the will was presumptively void and the burden of proving its validity upon the beneficiaries under it.

THE opinion states the facts.

Glover and Shepley, and Harris and Crews, and North and Laurie, for the appellants.

Sharp and Broadhead, and Knox, for the respondents.

By Court, WAGNER, J. This was a proceeding instituted in the circuit court of Chariton County, and taken by a change of venue to St. Louis County by the appellants, who are heirs at law and personal representatives of W. D. Peticrew, to set aside the probate of his will. The respondents are beneficiaries under the will.

It appears that the deceased, Peticrew, was left an orphan when a mere child, inheriting a large estate, and that he had neither brothers nor sisters. The respondent, John P. Williams, was appointed guardian of his person, and curator of his

estate; and from the time of such appointment Peticrew resided in the family of Williams till the time of his death, except when he was absent at school. During all this time Williams had the exclusive management and control of the estate, and Peticrew seems to have given him his unreserved confidence.

Before Peticrew became of age he was attacked with consumption, and the record shows that it was painfully evident that he could not long survive. He was born September 12, 1839, and therefore arrived at age on the eleventh day of September, 1860. Two days prior to his becoming of age an attorney was employed to examine the accounts between him and his guardian, and on the 13th of the same month a settlement was made in the county court,—Peticrew receiving the note of his guardian for the amount due him, and entering a release of record discharging him and his securities. On the next day, the 14th of September, Peticrew, still being at Williams's house, made and executed his will, giving the whole of his large estate to Williams and his family, with two exceptions, and totally disinheriting all his kindred or relations. In the succeeding month of December he died.

From the view we have taken of the case as now presented, it will be unnecessary to comment upon or bestow any particular attention on the great mass of testimony embodied in the bill of exceptions. We must first examine whether the court below tried the case upon a correct theory.

Upon the trial the plaintiffs offered an instruction reciting all the facts in the case, and asked the court to declare, as a conclusion of law thereon, that the alleged will was presumptively procured by undue influence. The concluding paragraphs of the instruction are in these words: "And that the alleged will was made in the house of J. P. Williams, while said Peticrew was residing therein, on September 14, 1860, said Peticrew being only two or three days of age, and before the influence created over said Peticrew by the relations (guardianship) aforesaid had ceased to exist. The presumption arising from such facts is, that the alleged will was procured by the undue influence of J. P. Williams, and that presumption can only be repelled by satisfactory proof that no undue influence was used to procure the same." This instruction the court refused to give.

There is no subject in the whole range of equity jurisprudence where its salutary principles have been more often

invoked than in those cases where donations have been obtained by persons standing in some confidential, fiduciary, or other relation toward the donor, and where they may have exercised dominion over him. Transactions of this kind taking place between attorney and client, spiritual adviser and advisee, trustee and *cestui que trust*, parent and child, and guardian and ward, are watched by courts with the most scrutinizing jealousy, and generally held to be presumptively void.

Whilst all those confidential relations are essentially governed by the same principles, we shall confine this discussion mainly to the law as adjudged and written in reference to guardian and ward. And here it must be observed that the rule is applied not exclusively while the relation actually exists, but for such period of time thereafter as may be sufficient to insure complete emancipation on the part of the ward, and afford him an independent and unbiased opportunity to investigate for himself and see that everything is correct.

Chancellor Walworth said, in one case, that it was not the practice of the court to discharge the guardian absolutely, and to order his bond to be given up immediately upon the infant's arriving at age, although he had settled with the guardian; that the ward, notwithstanding such settlement, was entitled to a reasonable time after he became of age to investigate the accounts of the guardian, and to surcharge and falsify the same if, upon such investigation, he found anything wrong: *In re Van Horne*, 7 Paige, 46; Willard's Eq. 182.

Mr. Justice Story discusses the question with his accustomed clearness. He says: "In the next place, as to the relation of guardian and ward: in this most important and delicate of trusts, the same principles prevail, and with a larger and more comprehensive efficiency. It is obvious that during the existence of the guardianship the transactions of the guardian cannot be binding upon the ward if they are of any disadvantage to him; and indeed, the relative situation of the parties imposes a general disability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the most

abundant good faith (*uberrima fides*) on the part of the guardian; for in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased; as, if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian": 1 Story's Eq. Jur., sec. 317. The English editors of Leading Cases in Equity lay it down as settled doctrine that a donation from a ward to a guardian is looked upon with great jealousy; and if it has been obtained immediately upon the ward attaining his majority, it will be set aside upon the presumption of undue influence having been used by the guardian, and even a considerable time after that event, upon proof that the influence of the guardian over the ward still existed; and if undue influence can be fairly presumed from the relative positions of the parties, or proved, the trouble or loss of time the guardian may have sustained in fulfilling the duties of his office will not avail him as a defense or excuse for accepting or obtaining such a donation: White and Tudor's Lead. Cas. Eq. 490.

In *Hylton v. Hylton*, 2 Ves. Sr. 547, an uncle, who was trustee, and acted as guardian to his nephew, upon coming to an account and delivering up the estate to his nephew, who was then about twenty-two years of age, took from him a general release and written discharge, and also a voluntary grant of an annuity of sixty pounds. Lord Hardwicke set the annuity aside upon a bill filed by the nephew. "Where," said he, in delivering his opinion, "a man acts as guardian, or trustee in the nature of guardian, for an infant, the court is extremely watchful to prevent that person taking any advantage immediately upon his ward or *cestui que trust* coming of age, and at the time of settling accounts and delivering up the trust, because an undue advantage may be taken. It would give an opportunity, either by flattery or force,—by good usage fairly meant, or bad usage imposed,—to take such an advantage, and therefore the principle of the court is of the same nature with relief in this court, on the head of public utility; as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage-brochage bonds. All depends upon public utility, and therefore the court will not suffer it; though perhaps in a particular instance there may not be any actual unfairness."

In *Hatch v. Hatch*, 9 Ves. 292, a guardian, who was an incumbent of a living, obtained from his ward, soon after she became of age, a conveyance of the advowson of the living, expressed to be made in consideration of her great friendship, kindness, and regard for him, the care taken of her by him, etc., and of ten shillings to his brother, who was the attorney who prepared the deed, and one of the attesting witnesses, and who afterward became her husband. She continued to live with her guardian for about four years afterward, when she married her guardian's brother; and sixteen years after her marriage, upon the death of her guardian, she and her husband filed a bill to be relieved against conveyance. Lord Eldon, considering that she had never been her own mistress, being with her guardian till her marriage, and with her husband since, notwithstanding the time that had elapsed, and taking into consideration the nature of the property, ordered the instrument to be delivered up and canceled.

In the course of his able judgment he declared: "This case proves the wisdom of the court in saying it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for antecedent duty. There may not be a more moral act, or one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if a trustee, having done his duty, the *cestui que trust*, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given." He adds that "in discussing whether it is an act of rational consideration,—an act of pure volition, uninfluenced,—that inquiry is so easily baffled in a court of justice, that, instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression. And therefore, if the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud."

Again, in the case of *Huguenin v. Basely*, 14 Ves. 299, the same learned chancellor reviews the cases, and places his decision on the ground of public utility; and in *Wood v. Downes*, 18 Id. 127, the same doctrine is reiterated. Since those decisions were rendered, there are many cases reported in the English books, some of which might seem to qualify or miti-

gate the stringent and inflexible rule laid down by the early chancellors; but an examination will show that where gifts or donations have been upheld between parties where confidential relations existed, it has been under special and peculiar circumstances, and where an entire absence of undue influence was apparent.

Where a case comes fairly within the rule, we do not see that it is in the least abated. In the case of *Gale v. Wells*, 12 Barb. 84, where a guardian, soon after the ward became of age, but while the latter was still at college, and before the guardian had settled his accounts with the ward, procured the ward's indorsement to a note made by the guardian for the payment of a precedent debt owing by the guardian to a third party, who took the note and indorsement with notice of the relations between the maker and indorser, it was held that the note could not be enforced against the ward. The court declared that the law inferred undue influence in such a case, without allowing an inquiry as to whether it actually existed or not, on account of the difficulty of establishing it and the danger to wards of leaving that question open while the relationship of guardian and ward existed.

In *Meek v. Perry*, 36 Miss. 190, David McKinnie died, leaving two daughters, Mary and Louisa. Michael McKinnie, their uncle, qualified as their guardian. Five months after Louisa had arrived at age, being in low health, she made her will, giving all her property to her uncle, the guardian, and disinheriting her sister, and died four days afterward. The supreme court of Mississippi set the will aside, and said that in transactions between guardian and ward, the law, upon a principle of public policy, and to protect the ward against the efforts of overweening confidence and self-delusion, and the infirmities of a hasty, precipitate judgment, presumed the existence of undue influence on the part of the guardian, and therefore such dealings were *prima facie* void, and would be so held unless the guardian showed, by the clearest proof, that he dealt with the ward exactly like a stranger, taking no advantage of his influence over him, or of his superior knowledge in relation to the subject-matter of the transaction, and that the ward's act was the result of his own volition and upon the fullest deliberation. See also *Gaither v. Gaither*, 20 Ga. 721; *Taylor v. Taylor*, 8 How. 183; *De Montmorency v. Devereux*, 7 Clark & F. 188; *Wells v. Middleton*, 1 Cox, 125; *Fish v. Miller*, 1 Hoff. Ch. 273.

One of the ablest, most satisfactory, and clearest reasoned cases that I have seen concerning grants or donations to persons occupying confidential or fiduciary relations, is *Greenfield's Estate*, 14 Pa. St. 489. There the court held a grant by a woman eighty-six years of age, of all her property to four persons in trust, to apply the proceeds to her support during life, and to sell and distribute the whole after her death, valid,—thus sustaining her capacity to grant; but struck out a gift or bequest of ten thousand dollars to each of the trustees, on the ground that one was her friend and confidential adviser, and another her attorney, and that there was nothing to take the case out of the general rule that gifts to agents and trustees are *prima facie*, if not absolutely, invalid. In their most lucid opinion the court say: "The deeds were prepared by Mr. Bouvier, who for some time prior had been the legal adviser and confidential attorney of Mrs. Greenfield. In this instance he acted upon the express suggestion and recommendation of Mr. Howell, in whom the donor reposed the most implicit faith. It is evident that both of these gentlemen exercised over her an almost unbounded influence, and were thus enabled to give direction to her thoughts and actions. Mr. Rush also stood toward her in a fiduciary relation; and the fourth trustee, Mr. Roberts, was brought into the business by Mr. Howell, under a recommendation well calculated to command her utmost trust.

"For a considerable time before the conveyance, it is proved she was improvident, if not extravagant, in the expenditure of her fortune, and in reference to it, singularly open to solicitation and importunity. In the language used at *nisi prius*, she was generous to a fault, and seems to have been haunted by a passion for giving. While indulging this inclination for expenditure, the deeds in question were made. By these is reserved to the trustees the sum of forty thousand dollars, being ten thousand dollars to each, professedly as a compensation for assuming the burden of a trust which might have been terminated in a year, and according to every probability, would not endure for a very long period. As the award for the future management of an estate worth at the utmost only five times as much, the sum named has been designated as inordinate; yet this fact will by no means justify a charge of actual fraud against the parties who principally managed this transaction. As already intimated, there is no proof in the cause to warrant so grave an accusation, especially against

individuals enjoying the eminent reputation which all accord to these trustees. I can very well imagine how, without a violation of conscience, they might conceive themselves entitled to a princely remuneration under the circumstances then surrounding the donor. But, in spite of this concession, a rule of public policy and pure morals, founded in long experience of the human heart and knowledge of man's cupidity, interposes to forbid an allowance of the claim. In this feature the case presents what is called a constructive fraud, springing from the confidential relations existing between the parties. This peculiarity, withdrawing it from the operation of ordinary rules, throws upon the beneficiaries the duty of showing expressly that the arrangement was fair and conscientious beyond the reach of suspicion. In requiring this, courts of equity act irrespective of any admixture of deceit, imposition, overreaching, or other positive fraud. As it has been often said, the principle stands independently of such elements of active mischief. It is founded upon a motive of general policy, and is designed to protect a party, so far as may be, against his own overweening confidence and self-delusion, the infirmities of a hasty judgment, and even the impulses of a too sanguine temperament. It has been beneficially applied to those confidences which owe their birth to the relations of parent and child, guardian and ward, trustee and *cestui que trust*, and above all, attorney and client. To guard against the strong influences which these connections are so apt to originate, the law not only watches over the transactions of the parties with great and jealous scrutiny, but it often declares transactions absolutely void which between other parties would be open to no exception."

From the foregoing authorities, and many others which might be cited, it will be seen that the rule in regard to the bestowment of gifts, grants, or donations, where a trust or confidence exists between the parties, is well established. That cases may be found in which it has been relaxed, or where judges, owing to particular circumstances, have denied its application, is not doubted. But the rule is just in itself, founded on high principles of morality, public policy, and utility, and its force ought not to be impaired. It is, however, contended that, although it may be applicable to deeds and transactions between the living, it does not extend to wills. But I am unable to perceive any distinction, either in reason, principle, or authority. The text-writers speak of the

rule generally, and apply it to all transactions alike, and many of the cases are direct adjudications where wills were in issue. Mr. Greenleaf, in his treatise on the law of evidence, lays down the doctrine "that being under guardianship at the time is *prima facie* evidence of incapacity, but open to explanation by other proof."

The case of *Breed v. Pratt*, 18 Pick. 115, is clear and conclusive upon the subject of guardian and ward, where a will was made during the existence of that relation. Although the direct question there was the mental capacity of the testator, still the remarks of the court are equally applicable to the one now under consideration. Shaw, C. J., in delivering the opinion of the court, said: "Inasmuch as the relation of guardian and ward places the person and property of the ward in the custody of the guardian, where a will is made beneficial to the guardian, it is to be taken as strong evidence bearing upon the point of the mental capacity of the testator and his freedom of will and of action; but it is to be taken as evidence which may be met and controlled by counter-proofs. It is *prima facie* evidence of insanity and incapacity to make a will; and therefore it is incumbent on those who would establish the will to show, beyond reasonable doubt, that the testator had such mental capacity and such freedom of will and action as are requisite to render a will legally valid."

It would be indeed strange and remarkable if any distinction were made, and the doctrine did not apply to wills; that the law should watch with such extreme jealousy, and throw every safeguard around the living, and deny it to those who were just ready to sink into the grave on account of disease; that, on grounds of public utility, men of health should be protected because, by reason of certain confidence they were placed in a situation where they were liable to be imposed on, yet when they were placed in the same relation, emaciated by sickness and bereft to a great extent of their intellectual capacity, they should fall a prey to cupidity and avarice.

When advantage is taken of persons living, and they have been deprived of their rights by undue influence, their wrongs may be made known, and a remedy is easily afforded; but where a will is procured from a person stricken with disease from which he never recovers, who is to disclose the injustice which has been perpetrated, and unfold the means which led to its execution? It is true that while the testator is living, his will is ambulatory, and may be altered or revoked; but

this principle is of no consequence when he is induced to make and publish it in view of impending death, when no opportunity of reconsideration is open to him. In this case young Peticrew resided in the family of Williams; the evidence shows that he surrendered everything to Williams's judgment, and that he reposed the most implicit confidence in him in every respect. How that confidence was acquired, and with what view, we will not stop to inquire. The extraordinary haste with which the settlement was pushed immediately on the ward's coming of age, and the rapidity with which the will followed on the next day, needs explanation.

At the time of making the settlement Peticrew was too sick to attend to any business, and manifested little or no interest in what was going on; his declaration in regard to the whole matter was, that he had confidence in Williams, and supposed it was all right. When the settlement was concluded he returned to Williams's house, and there, on the next day, made his will. It does not appear that Williams or any of his family who are beneficiaries were present in the room at its execution; but if they were instrumental in procuring the disposition that was made of the property, they would most probably be absent. The hand that directs such acts most generally withdraws from the public gaze. Then Williams started south with Peticrew, and was with him till he died.

In all this there may have been nothing unfair or unjust. The kind treatment that Peticrew received from Williams and his family may have sprung from generous and disinterested motives, and not resulted from selfish or sinister purposes. But they are the only persons who are capable of explaining the matter satisfactorily. Williams was placed in a confidential relation, where the most exact good faith was required of him,—where it was incompetent for him to take a benefit for himself without showing that the benefit flowed from the free, unbiased, independent will and uninfluenced volition of his ward.

Under the circumstances in which the will was made it was presumptively invalid, and the burden of proving its validity rested upon those who sought to derive an advantage under it. The instruction, therefore, hereinbefore alluded to, which was refused by the court, should have been given. I have not been able to find any other error in the record.

That young Peticrew labored under a delusion in respect to the designs of his Aunt Garvin will not admit of a moment's

doubt. His declarations were competent to show the state of his mind, but they were not admissible against the defendants to prove that they had used the language which poisoned him against his relatives. They were mere hearsay, and therefore the court did not err in rejecting them.

The judgment must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

The other judges concurred.

LAW LOOKS WITH DISTRUST AND SUSPICION upon all transactions where persons occupying special or confidential relations seek to obtain an advantage inconsistent with their position: *Harvey v. Sullens*, 46 Mo. 151. The doctrine of undue influence is chiefly invoked between guardian and ward, parent and child, principal and agent, and patient and medical adviser, though it is not confined to these narrow limits. In all such cases there exists no necessity to show fraud or imposition practiced on the one bestowing the confidence that is presumed, and it is only necessary to show that during the pendency of the intimate relations the conveyance was made; the burden of proof is then on the beneficiary to show the honesty and utmost good faith in the transaction: *Street v. Goss*, 62 Id. 229; *Garvin v. Williams*, 50 Id. 311; *Ranken v. Patton*, 65 Id. 411; *McKinney v. Hensley*, 74 Id. 332; *Gaspary v. First German Church*, 82 Id. 652; S. C., 12 Mo. App. 314; *Bridgwell v. Swank*, 84 Mo. 467; *Miller v. Simonds*, 5 Mo. App. 49; *Miller v. Lullman*, 11 Id. 425, all citing the principal case.

KOCH v. BRANCH AND CROOKES.

[44 MISSOURI, 542.]

COMMISARY VOUCHER IS NOT IN COMMERCIAL SENSE a bill of exchange or negotiable instrument, and the law merchant has no application to it. It is, however, property, and when actually sold, passes by delivery like other personal property. But the purchaser can acquire no greater right than that of the seller, and when the property is stolen, there can be no further transfer.

SALE OF STOLEN PROPERTY BY AGENT for benefit of principal, both being innocent of the fact that the property was stolen, amounts to conversion by the agent, and makes him liable to the owner.

SALE OF STOLEN PROPERTY BY ANOTHER BY AGENT for the benefit of his principal evidences conversion; and to make the agent liable, it is not necessary that he use the proceeds for his own benefit.

NO TITLE CAN PASS THROUGH THIEF. Those who buy of him should be compelled to give up the property, unless they have converted it, when they should be held for its value. Factors and agents should be held to the same accountability.

FACT THAT ONE TAKES POSSESSION OF STOLEN PROPERTY, as depositary or common carrier, will not charge him with conversion, but some action by which it is converted into something else, as into money or other prop-

erty, either by sale, exchange, or collection, or some intermeddling inconsistent with the owner's right should be found, in order to make the person responsible who has obtained innocent possession.

THE opinion states the facts.

Finkelnburg and Rassieur, for the appellants.

S. Knoz, for the respondents.

By Court, BLISS, J. In February, 1864, the plaintiffs were engaged in mercantile business at Fort Smith, Arkansas, and purchased of one Hunt, an army beef contractor, a commissary voucher issued to him for \$1,448. Soon after its purchase it was stolen from the store, and the thief was never discovered. In February, 1865, one Richard Branch purchased the voucher of a stranger, and forwarded it to his brother in St. Louis, one of the defendants, who collected it of the government, and paid over the amount to his brother, charging no commissions. He was a partner of the firm of Branch, Crookes, & Co., composed of defendants, and made the collection in their name. There seems to be no dispute about the facts, and in the trial below the court declared, as matter of law, that the plaintiffs were not entitled to recover.

It is admitted that the defendants received no benefit from the transaction; but the plaintiffs claim that the paper was not negotiable, and continued to be their property into whose-soever hands it went; that defendants controlled it for a time, converted it into money, and paid it over, and thus were the cause of the plaintiffs' ultimate loss.

A voucher of this kind is simply an account against the government, approved by the officer who received the property embraced in it, and is paid on presentation. It is not, in the commercial sense, a bill of exchange or other negotiable instrument, and the law merchant has no application to it. It is, however, property, or rather, convenient representation of property, and when actually sold, passes by delivery like other personal property. But the purchaser can acquire no greater right than that of the seller, and when the property is stolen there can be no further transfer. It does not, like a note or bill, become the property of an innocent holder by virtue of its negotiability, for he can only hold it as his own by virtue of his title, and no title can pass through a thief. This principle has no relation to the doctrine of title by purchase in market overt, for that is part of the common law never adopted in this country.

Admitting that Richard Branch had no title to the voucher when he sent it to the defendants for collection, does their agency in the matter so involve them in the plaintiffs' loss as to subject them to liability? The answer to this question depends upon the character given to such a voucher. If it is a mere account,—a memorandum of a claim,—its loss is nothing. A new one could be made just as good. But it is much more. It is, as we have seen, an audited demand, specifically represented by the paper, and which will be paid only on its presentation. It, therefore, represents the claim, has value in itself, is an object of barter and sale, and I can see no reason why it should not be treated as other property. The liability of those who meddle with stolen property, and do anything in regard to it, by which the owner is prevented from recovering it, has been fixed by repeated adjudications. We are referred, in this country, to *Hoffman v. Carow*, 22 Wend. 285, which is an affirmance by the court of errors of a judgment of the supreme court, reported in 20 Id. 21; and to *Rogers v. Hine*, 1 Cal. 420. In both cases, an auctioneer was held liable to the owner of stolen goods for their value, although he sold in the usual course of trade, without knowledge of the felony or the claim of the owner, and paid over the proceeds to the person for whom the sale was made. His sale was construed to be a conversion, although made for the benefit of others. The doctrine of *Hoffman v. Carow*, *supra*, has never been departed from in New York or elsewhere that I know of, but constantly affirmed. Justice Beardsley, in *Schroeppel v. Corning*, 5 Denio, 240, says that "any wrongful act which negatives or is inconsistent with the plaintiff's right is a conversion. It is not necessary that the defendant should have made use of the property in any way."

In England, the ancient doctrine that title passed for everything sold in market overt, with the requirement that the felon must be prosecuted to conviction before the property itself can be pursued, destroys the authority in this country of many of its decisions. And yet, when nothing intervened to suspend the vindication of the owner's title, the same ruling is had as in *Hoffman v. Carow*, and *Rogers v. Hine*, *supra*. In *Stephens v. Elwall*, 4 Maule & S. 259, the plaintiffs were the assignees in bankruptcy of one Spencer, and his goods, by the act of bankruptcy, became vested in them. The bankrupt sold to one Deane, who bought for a trader in America, who had a house in London, in which defendant was his clerk. Defendant

received and shipped the goods to his principal, which act was held to be a conversion. Lord Ellenborough remarks: "The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master; but nevertheless, his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it." Le Blank, J., had held at the trial that the defendant was not liable, but in bank said that he was mistaken. For further reference to the English decisions as to what constitutes conversion, see *Bac. Abr.*, tit. *Trover*, B.

The cases above cited may not go quite the length of the present one, yet I can see no difference in principle. The plaintiffs are deprived of their property through the wrongful—i. e., unauthorized—act of defendants. They converted it,—i. e., turned it into money,—and paid over the money to their principal without authority. A sale of another's property evidences conversion, and a demand in those states where it is in general necessary becomes useless. So, by analogy, would be any other voluntary act which changed its character and placed it beyond the reach of the owner. It is not necessary that he use the proceeds of the conversion for his own benefit.

In all these cases, the defendants complain of the hardship of being held for a wrong when no wrong was intended. It may seem hard, but it is no harder than for the plaintiffs, without fault on their part, to lose their property. And besides, the defendants, without designing to injure the plaintiffs, were, as well as their principal, guilty of neglect. No one should buy property without good reason to believe that the seller has a right to sell it. The loose habit that prevails of buying everything that is offered is but a bounty to theft. If thieves found purchasers less eager for cheap bargains, though from total strangers, they would find it less easy to follow their avocation. Public policy, as well as private rights, demands that the settled rule that no title can pass through a thief should not be relaxed, and those who buy it of him should be compelled to give up the property, unless they have converted it, when they should be held for its value. Factors and agents also should be held to the same accountability. It is their duty to know for whom they act, and whether they can be saved harmless, if their action shall amount to a conversion of another's property. Every exoneration from re-

sponsibility in the premises but facilitates the enjoyment of the fruits of larceny, and the hardship one suffers in a case like that under consideration is but one of the every-day fruits of a want of proper caution in business.

This doctrine of conversion should not, however, be carried too far. It is not the fact that one takes possession merely of property as a depositary or common carrier that should charge him; but some action by which it is converted into something else, as into money or other property, either by sale, exchange, or collection, or some other intermeddling inconsistent with the owner's right, should be found in order to make the person responsible who has obtained innocent possession.

With the concurrence of the other judges, the judgment of the circuit court is reversed, and the cause remanded.

INNOCENT SELLER OF STOLEN PROPERTY is liable to the owner for the value thereof: *Sharp v. Parks*, 95 Id. 565, and note 567.

ANY WRONGFUL ACT WHICH NEGATIVES or is inconsistent with the plaintiff's rights is *per se* a conversion: *Dusky v. Rudder*, 80 Mo. 407, citing the principal case.

AGENT IS GUILTY OF CONVERSION who intermeddles with any property and disposes of it, and he cannot excuse his liability by answering that he was acting under authority of another, who had no authority to dispose of it, and this whether he was conscious of wrong or not: *Williams v. Wall*, 80 Mo. 322, citing the principal case.

ONE ACTING IN GOOD FAITH, WHO SELLS STOLEN GOODS received by him, is liable for their value: *Kramer v. Faulkner*, 9 Mo. App. 35, citing the principal case.

NELSON v. BRODHACK.

[44 MISSOURI, 594.]

SPECIAL DEFENSE IS NOT NECESSARILY INCONSISTENT with a denial; it is only inconsistent when there is an absolute incompatibility of facts.

IN SUIT ON NOTE, PLEAS OF NON EST FACTUM and payment or release are not inconsistent.

TWO OR MORE DEFENSES ARE INCONSISTENT only when proof of one necessarily disproves the other. The facts should be so set out that both defenses may be true.

IN EJECTMENT, PLEA OF STATUTE OF LIMITATIONS is not required to entitle defendant to its benefits. The necessity of pleading it depends upon its effect, whether it merely suspends the remedy or vests the absolute title in defendant. If the latter, there is no more necessity of pleading it than if he held plaintiff's title.

IN EJECTMENT, DEFENDANT NEED NOT SET UP TITLE in himself, or in any one else; it is involved in his denial of plaintiff's right. But if he wishes to avail himself of facts not amounting to such denial, he must plead them.

OPEN, NOTORIOUS, AND ADVERSE POSSESSION for the statutory period operates to convey a title as complete as any written conveyance.

1st DEED CONTAINS ANY DESCRIPTIVE LANGUAGE, whatever the style, that will enable one to identify the land, it is so far good.

DESCRIPTION OF LAND NEED NOT BE CONTAINED IN BODY OF DEED; if it refers for identification to some other instrument or document, it is sufficient. Or if no reference is made, surveys, monuments, etc., may be ascertained to locate the land. But while there is nothing technical as to matter of description, and the intention of the parties governs, it must be contained in the deed, or references, express or implied, with such certainty that the locality of the land can be ascertained from it.

SAME PRESUMPTION OF INTENTMENT CANNOT BE INFERRED from a sheriff's deed as from a direct conveyance from the grantor. In the latter case, the ambiguity is the grantor's fault; he has voluntarily sold his property, and received the proceeds, and everything should be construed more strongly against him than his grantee.

SHERIFF'S DEED, VOID FOR UNCERTAINTY IN DESCRIPTION of the land conveyed, is not cured by reciting notice by advertisement of the time and place of sale and the property to be sold, "a copy of which advertisement is hereto annexed, and makes part of this deed," and in the granting part reciting that he transfers to the purchaser the interests of defendant "in and to the above-described property." The advertisement cannot be deemed part of the description, and as the latter in no way refers to the former, it is not modified or controlled by it.

THE opinion states the facts.

Hoespes, for the appellant.

Clover and Reber, for the respondent.

By Court, BLISS, J. This was an action of ejectment for two parcels of land in the Durand tract, in the city of St. Louis. The plaintiff, under the pleadings, was required to prove title; and failing to do so, judgment was given for defendant. The issues were made by a denial of the plaintiff's allegations, and upon a plea purporting to be a plea of the statute of limitations; and the defendant claims that the last plea was a confession of the plaintiff's original right,—was inconsistent with the denials, and relieved the plaintiff from the necessity of proving title. The objection raises the question whether an answer setting up new matter by way of defense is so far a confession of the cause of action as under our statute to be inconsistent with its denial. The logic of the old special pleas in bar admitted the material allegations of the plaintiff, but pleaded *actio non*, *quia* the new matter. In a technical sense, they were inconsistent with the denial; and to obviate it, the more recent forms in Chitty threw in an "if," etc., but they were never held to be so inconsistent as not to

be pleadable together, unless there was an absolute incompatibility of facts. If we were to limit our statutory allowance of consistent defense by the strict logic of the old special pleas in bar, all special defenses would be cut off when the cause of action was denied; for such special defenses are technically supposed to confess and avoid, although in fact they may not confess at all. Such an interpretation of the statute should not be adopted if there is any other that will give a party his clear right to several defenses.

A special defense is not necessarily inconsistent with a denial. For instance, suppose A sues B upon a promissory note; B denies its execution, in the nature of a special *non est factum*, under the old system, and afterwards alleges payment or release. He does not thereby deny the existence of the paper; and an averment of payment, or any other matter of discharge, is not necessarily inconsistent in fact with original non-liability, for men sometimes adjust demands for which they are not liable. If, notwithstanding, the demand is put in suit, it would be unjust to deprive a defendant of every lawful defense. Some interpretation, then, of the term "consistent defenses" should be adopted, if possible, that shall be consistent with the statute and secure the rights of full defense. That right will be secured if the consistency required be one of fact merely, and if two or more defenses are held to be inconsistent only when the proof of one necessarily disproves the other. Two statements are not inconsistent if both may be true. Thus, if one has paid or performed a forged or unauthorized or altered promissory note or covenant, he may deny, not the existence of the paper, but that it was his promise or deed, and also aver its payment or satisfaction. But under our system, the facts should be so set out that both defenses may be true. So, in slander, for charging one with being a thief, the defendant may deny the words, and add the *actio non* because the plaintiff stole a horse. Proving the larceny does not prove the speaking the words. The logic of the justification under the old system might be held to admit the act justified, yet there is no inconsistency in the facts alleged. Other illustrations might be given, but none would be more pertinent than the case at bar.

The plaintiff states that at a certain time he was the owner of and lawfully entitled to the possession of certain land, and that defendant unlawfully held it from him. Defendant denies both propositions, and afterward says "that he and those

under whom he claims have had and held open, notorious, and continuous and exclusive possession of the premises sued for ten years prior to the commencement of this suit, adverse to all other persons, and to the plaintiff, and that such possession bars the plaintiff." This answer differs from the usual form of pleading the statute, and if it pleads it at all, is clearly argumentative. But supposing it had been never so formal, would there have been any inconsistency in fact between that allegation and an express denial of title? As we shall presently see, the plea was wholly unnecessary; but whether necessary or not, it admitted nothing, but only gave a reason, as it were, for the denial of title.

But in ejectment, the plea of the statute of limitations is not required in order to entitle the defendant to its benefits. The plaintiff alleges that he is the owner, and is lawfully entitled to the possession, and that defendant unlawfully holds it from him. These are affirmative facts, which, if denied, he must prove. He must show such title in himself as should give him possession. If the defendant is the lawful owner, the plaintiff fails, and fails upon the issue he tenders. It is not necessary for the defendant to set up, by way of answer, title in himself or any one else; it is involved in his denial of the plaintiff's right. But if the defendant wishes to avail himself of any facts that do not amount to such denial, as, for instance, that the plaintiff's remedy is suspended by adverse possession of defendant, if such distinction can be made, he must plead it. The necessity, then, of pleading the statute of limitations depends upon its effect, whether it merely suspends the remedy, or vests in the defendant the absolute title to the property. If the latter, there is no more necessity of pleading it than though he held the plaintiff's title.

The effect of the statute in this regard is no longer open to question. Says Washburn: "In summing up the effect of an adverse possession continued for such a length of time as to operate as a statute bar to the claims of others to establish a title to lands, the language of the court in *School District etc. v. Benson*, 31 Me. 384, may be adopted. A legal title is equally valid, when once acquired, whether it be by disseisin or by deed; it vests the fee-simple, although the modes of proof, when adduced to establish it, may differ." "An open, notorious, and adverse possession for twenty years would operate to convey a complete title as much as any written conveyance. . . . The operation of the statute takes away the title of the real

owner and transfers it to the adverse occupant": 3 Washburn on Real Property, 501.

The supreme court of Pennsylvania, in *Moore v. Luce*, 29 Pa. St. 262 [72 Am. Dec. 269], says: "The statute of limitations gives a perfect title. It is a mistake to suppose that the person barred loses nothing but his remedy." The court speaks to the same effect, but more emphatically, in *Schell v. W. V. R. R. Co.*, 35 Id. 191. The same doctrine is held in *Grant v. Fowler*, 39 N. H. 101. The following is the *syllabus* in *Hughes v. Graves*, 39 Vt. 259: "The party who acquires a title to land under the statute by possession adverse to the true owner acquires all the title of the true owner, precisely as if he had a deed from him." This court, in *Biddle v. Mellon*, 13 Mo. 335, affirmed in *Blair v. Smith*, 16 Id. 273, has held the same doctrine, and all the authorities are the same way.

A plea of the statute of limitations, then, is simply a denial of the plaintiff's title. It can have no other legal effect. It need not be pleaded: See, upon this point, *Ellis v. Murray*, 28 Miss. 129, where the court says that "the defendant was therefore not required to plead the statute of limitations; and when the seisin was denied, the demandant was required to prove it within the time prescribed." This case was followed in *Lord v. Wilson*, 35 Mo. 490. See also Jackson on Real Actions, 157, 290; and Stearns on Real Actions, 241. The form of the action for the possession of real estate in Massachusetts and other eastern states differs from the action of ejectment, and so does that under our code, but the same substantial issues are made and result reached. In ejectment special pleas in bar are not allowed, the general plea putting everything in issue: 1 Chit. 507; Adams on Ejectment, 270. The present New York code (section 74) requires the statute to be always set up, while the Ohio and Kansas codes (Ohio, section 559, and Kansas, section 596) substantially provide for the old issue. Our statute is silent upon the subject, but as a plea of the statute would be only setting up title in the defendant, which is embraced in the denial of the plaintiff's right, I cannot see upon what principle it should be required. In personal actions the case is very different. *Actio non accrevit* or *non assumpsit infra sex annos* is very different from, and is not included in, a mere *non assumpsit*; and in such actions it is always necessary to plead the statute.

I have felt some embarrassment in considering this ques-

tion, from the opinion of Judge Holmes, in *Bauer v. Wagner*, 39 Mo. 385. The decision in that case was clearly right; but the language of the opinion indicates a view of the subject under discussion adverse to the conclusion to which I have arrived, in holding it necessary to plead the statute, and to its supposed corollary that the title of the plaintiff is thereby admitted. I cannot but think that the truly learned judge was misled by the authorities he cited, which refer exclusively to personal actions, and that his attention failed to be arrested by the fact that possession under the statute absolutely divests the title of the plaintiff, and not his remedy merely.

In the trial of the case at bar, the plaintiff, to sustain his title, offered a deed from the sheriff, executed in 1849, for what he claims to be the land in controversy. The deed recites the levy upon certain land, but the description is so imperfect that nothing could pass by that alone; but it further recites that he gave notice of the time and place of sale, and of the real estate to be sold, by advertisement in the *St. Louis Daily Union*, etc., "a copy of which advertisement is hereto annexed, and makes part of this deed"; and in the granting part he transfers to the purchaser the interests of the defendant in execution "in and to the above-described real estate." The copy of the advertisement is attached by a wafer after the signature; and in addition to the description in the recital of the levy, I find in it the following: "Being the same property which was conveyed by the city of St. Louis to T. M. Knox, by deed recorded," etc. Among the exhibits offered was a transcript of this deed, marked "Exhibit B," and from the description in it, and in several other deeds connected with it, testimony was offered to locate the land, which was rejected, and the court instructed the jury as follows: "The jury are instructed, as to the land described in the deed of the sheriff to the plaintiff, Nelson, dated the 20th of April, 1849, given in evidence by him, and described as containing fifty-two feet, more or less, front on the Carondelet road or avenue, by forty arpents in depth, in the Durand tract, that the plaintiff took no title under said deed to said land, because said deed was and is void for uncertainty in the description of said land, and the plaintiff is consequently not entitled to recover in the cause upon his evidence as made."

The uncertainty in the description of the land is given as the radical defect of the deed. So we are relieved from the necessity of examining the title of the execution of defend-

ants, and must inquire whether this description is so uncertain as to make the conveyance worthless.

There is nothing technical in this matter of description. As land cannot be bodily delivered, it can pass only by such descriptions as will identify it; and if a deed contains any language, whatever the style, that will enable one to do so, it is so far good. It is not necessary that this description be contained in the body of the deed; but if it refers, for identification, to some other instrument or document, as to another deed or map, it is sufficient. Or if no reference be made, surveys, monuments, etc., must be ascertained, in order to locate the land. But while there is no technical rule in regard to the description, and the intention of the parties governs, it must be contained in the instrument or its references, expressed or implied, with such certainty that the locality of the land can be ascertained from it. As, if the description were ten acres, being part of a certain lot, it is uncertain what part of the lot is meant; but if it were ten acres of said lot next south of Richard Roe, then it may be capable of measurement, after finding the lot and Richard Roe's land; and in finding the lot, or any lines or boundary referred to, any proper evidence is admissible: See *Kronenberger v. Hoffner*, 44 Mo. 185.

It should be premised that the same presumption of intent cannot be inferred from a sheriff's deed as from a direct conveyance by the grantor. In the latter case the ambiguity is the grantor's fault; he has voluntarily sold his property and received the proceeds, and everything should be construed more strongly against him than his grantee. Judge Napton, in *Hart v. Rector*, 7 Mo. 534, remarks that a sale by process of law should be governed by very different rules from those which apply to an ordinary conveyance. There is in the present case no especial equitable consideration that should induce us to give more effect to the deed than its face imports.

In the case at bar, can the advertisement be treated as part of the description? It certainly may, if it is referred to for that purpose, but in giving the description there is no reference whatever to it. Is, then, the recital of the notice any part of the description? or is it made to show upon what the levy was made, or for the purpose of showing that legal notice was given before the sale? Clearly, to prove the fact of the notice. In referring, then, in the granting part of the deed, "to the above-described real estate," would any one naturally suppose

that anything was referred to but the actual description alone given in the recital of the levy? Would the advertisement be once thought of in endeavoring to find the land levied on, unless referred to for that purpose? It seems clear to me it would not, and the reference "to the above-described real estate" meant, and could mean only, the real estate actually above described, and that description, in no way referring either directly or indirectly to the advertisement, is not modified or controlled by it. I have examined all the authorities referred to by plaintiff's counsel, and find none that will go the length of his claim, even in private deeds.

The judgment should be affirmed.

CURRIER, J., concurred.

WAGNER, J., was absent.

ANSWER MAY CONTAIN DENIAL, and as many special defenses as defendant may have, provided they are separately stated, and are consistent: *Rhine v. Montgomery*, 50 Mo. 568; *McAdow v. Ross*, 53 Id. 203; *Smith v. Culligan*, 74 Id. 389; *State v. Rogers*, 79 Id. 286; *Springer v. Kleinsorge*, 83 Id. 156, all citing the principal case.

DEFENSES ARE INCONSISTENT only when proof of one necessarily disproves the other: *Patrick v. Boonsville Gas Light Co.*, 17 Mo. App. 465; *Wood v. Hilbish*, 23 Id. 397; *Ledbetter v. Ledbetter*, 88 Mo. 62, all citing the principal case.

DIFFERENT DENIALS IN ANSWER ARE NOT INCONSISTENT, if both be true in point of fact: *Moore v. Macon Savings Bank*, 22 Mo. App. 694, citing the principal case.

TITLE BY ADVERSE POSSESSION: *Hughes v. Graves*, 94 Am. Dec. 331; *Arrington v. Liscom*, 94 Id. 722, and notes to these cases. Actual adverse possession for ten years, or the statutory period, vests as valid a title in the occupant, as if he had an unbroken title by deed: *Ridgeway v. Holliday*, 59 Mo. 453; *Watt v. Donnell*, 80 Id. 198; *Cunningham v. Snow*, 82 Id. 592; *Allen v. Mansfield*, 82 Id. 693; *Fugate v. Pierce*, 49 Id. 446, all citing the principal case.

DEFENDANT IN EJECTMENT need not plead the statute of limitations; the latter not only bars plaintiff's recovery, but confers title on the occupant, which he may show under the general issue: *Fulkerson v. Mitchell*, 82 Mo. 21; *Hulsey v. Wood*, 55 Id. 253; *Campbell v. Laclede Gas Co.*, 84 Id. 368; *Hill v. Bailey*, 8 Mo. App. 87; and see *Dunn v. Miller*, 8 Id. 477, all citing the principal case.

PROPERTY WHEN SUFFICIENTLY DESCRIBED in deed, making reference to another instrument for description: *Newson v. Tymeson*, 80 Am. Dec. 735, and note 738; *Caldwell v. Center*, 89 Id. 131.

THE PRINCIPAL CASE IS CITED and followed, as to this point, as stated in the syllabus, *supra*, in *Brown v. Walker*, 11 Mo. App. 235; and see also *Hannibal etc. R. R. Co. v. Green*, 68 Mo. 178, also citing the principal case.

ADVERTISEMENT IS NOT ADMISSIBLE to show land conveyed by sheriff's deed void for uncertainty in description: *Broughton v. Birchmore*, 18 Am. Dec. 654.

GOODMAN v. HANNIBAL ETC. RAILROAD COMPANY.

[45 MISSOURI, 32.]

BUILDING DOES NOT BECOME PART OF REALTY, BUT CONTINUES TO BE PERSONAL CHATTEL, and the property of the person who erects it on the land of another, by the latter's permission, upon an agreement that it may be removed at the pleasure of the builder.

WHERE LANDLORD, BEFORE EXPIRATION OF TERM, ENJOINS TENANT from removing the chattels or fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove them.

ACTION to recover possession of a lot. The defendant admitted the plaintiff's ownership of the lot and title to the possession, but alleged ownership in itself of a certain building standing on the lot, which it held and occupied by permission and license of the plaintiff's grantor, and that the plaintiff purchased the lot with full knowledge of the defendant's rights to the house. The defendant claimed to hold the premises as tenant at will, and to have a lawful right to remove the house before delivering possession of the lot to the plaintiff. Other facts appear in the opinion.

Carr, for the appellant.

Shafer and York, for the respondents.

By Court, **WAGNER, J.** The case was decided in the court below on demurrer to the defendant's answer. There was no error in sustaining the demurrer, but if the answer is true, the house is a simple personal chattel, and the defendant is clearly entitled to remove it. It is well settled that where a building is erected by one man upon the land of another, by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel, and the property of the person who erected it: *Dame v. Dame*, 38 N. H. 429 [75 Am. Dec. 195]; *Van Ness v. Packard*, 2 Pet. 137; *Taylor on Landlord and Tenant*, sec. 546.

And where the landlord, before the expiration of the term, enjoins the tenant from removing the chattel or fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the same: *Bircher v. Parker*, 40 Mo. 118.

Defendant admits that the title to the lot is vested in plaintiffs, and that they are entitled to the possession thereof. The answer, therefore, constituted no defense against acquiring

the possession, but that would not operate as an impairment of the right of the defendant to remove the building within a reasonable time. For aught that appears, the fixtures would have been removed before the dispossession of the defendant, had no restraint been used.

Judgment affirmed.

The other judges concurred.

BUILDING ERECTED ON ANOTHER'S LAND UNDER AGREEMENT FOR REMOVAL IS CHATTEL, and a grantee of the land acquires no interest therein: *Dame v. Dame*, 75 Am. Dec. 195, and see cases collected in note 200.

RULE FOR DETERMINING WHETHER THING IS FIXTURE: *Rogers v. Cross*, 93 Am. Dec. 299, and note 303; *Hill v. Sewald*, 91 Id. 209.

WHEN HOUSE NOT REGARDED AS PART OF REALTY: *Kelly v. Austin*, 92 Am. Dec. 243, and note 245; *Hamlin v. Parsons*, 90 Id. 284.

THE PRINCIPAL CASE IS CITED to the first point stated in the *syllabus*, in *Priestley v. Johnson*, 67 Mo. 636; and is distinguished as a case in which the privilege of removal was given when the building was put up, in *Hunt v. Missouri Pacific R'y Co.*, 76 Id. 121, holding the law to be well settled that if a building be erected upon land without the assent and agreement of the owner of the land, it becomes at once a part of the realty, and is the property of the owner of the freehold.

IN RE SALINE COUNTY SUBSCRIPTION.

[45 MISSOURI, 52.]

WRIT OF CERTIORARI ISSUES ONLY TO INFERIOR COURTS, and to review only judicial action.

JUDICIAL ACTION IS ADJUDICATION UPON RIGHTS OF PARTIES who in general appear or are brought before the tribunal by notice or process, and upon whose claims some decision or judgment is rendered.

IN APPROVING BOND OF SHERIFF, COUNTY COURT ACTS in a ministerial and not in a judicial capacity.

ACTION OF COUNTY COURT IN SUBSCRIBING TO RAILROAD STOCK AND ISSUING BONDS FOR PAYMENT THEREOF is a discretionary and not a judicial proceeding, and is not the subject of review by writ of *certiorari*.

PETITION of certiorari. The facts appear in the opinion.

W. B. Napton, for the petitioners.

J. B. Henderson, and Sharp and Broadhead, for the respondent.

By Court, *BLISS, J.* The county court of Saline County subscribed for four hundred thousand dollars of the stock of the Louisiana and Missouri River Railroad Company, and have issued bonds in payment of said stock. Philip H.

Thompson and other tax-payers of said county sued out of this court a writ of *certiorari* directed to the judges of said court, charging a want of authority to make the subscription and issue the bonds.

Before considering any other question, the preliminary one must be decided, whether *certiorari* will lie in a case of this kind. "A *certiorari* is an original writ issued out of chancery or the king's bench, directed in the king's name, to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice": Bac. Abr., tit. *Certiorari*, A. The matter not being regulated by statute in Missouri, either as to the cases in which this writ may issue or the practice under it, we are left entirely to the general law. The writ issues only to inferior courts, and to review only judicial action. Was, then, the action of the county court of Saline County, in subscribing to the stock of this railroad company and issuing bonds, a judicial action? Judicial action is an adjudication upon the rights of parties who in general appear or are brought before the tribunal by notice or process, and upon whose claims some decision or judgment is rendered. It implies impartiality, disinterestedness, a weighing of adverse claims, and is inconsistent with discretion on the one hand,—for the tribunal must decide according to law and the rights of parties,—or with dictation on the other; for in the first instance it must exercise its own judgment under the law, and not act under a mandate from another power. The tribunal is not always surrounded with the machinery of a court, nor will such machinery necessarily make its action judicial. A county court is certainly a judicial body for some purposes, but no more so for the name, nor for the fact that it has a seal and a clerk and keeps a record. The character of its action in a given case must decide whether that action is judicial, ministerial, or legislative, or whether it be simply that of a public agent of the county or state, as in its varied jurisdiction it may by turns be each.

The authorities all agree that the action to be reviewed by the writ must be judicial, but they are not wholly consistent as to what action is judicial. I find, however, a great preponderance, both in the reasoning of the judges, and, as I think, in the weight of the authority, against the proposition that proceedings like those of the county court under consideration can be treated as judicial. There are but two cases in our

reports where the writ of *certiorari*, as an original writ, was issued from this court. The first is *Rector v. Price*, 1 Mo. 198, where the principal question was the right to issue it under our then constitution; and the other is *Hannibal and St. Joseph Railroad Company v. Morton*, 27 Id. 317, to review the action of reviewers appointed by the circuit court in assessing damages to the owners of land over which this railroad passed. The question that arises in the present case was not raised in either of those, as there was no doubt in regard to the judicial character of the action under review; but our decisions upon the various subjects of county court jurisdiction, in relation to their character as judicial or otherwise, have been generally consistent.

The proceedings in general of county courts in probate matters have been treated as judicial, especially when they are adverse, and parties are brought in, or are supposed to be in court; and while some things in the laying out and opening of public roads may be considered as legislative or administrative, still all action affecting the property rights of private persons is clearly judicial, and subject to review in the appellate courts: *Overbeck v. Galloway*, 10 Mo. 364; *Cooper County v. Geyer*, 19 Id. 247; *Bernard v. Callaway County Court*, 28 Id. 37; *County of St. Louis v. Lind*, 42 Id. 348; *Foster v. Dunklin*, 44 Id. 216. This court, in *County of St. Louis v. Sparks*, 11 Id. 201, seems to treat the action of a county court against a defaulting collector as judicial, it having been based upon the provisions of article 2 of the act concerning county treasurers in the Revision of 1835, page 151,—a very different statute from the one now in force on the subject, and one that made it the duty of the county court to render judgment against the defaulter.

In approving the bond of a sheriff, county courts act in a ministerial and not in a judicial capacity: *State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 221; *State ex rel. Jackson v. Howard County Court*, 41 Id. 247.

County courts have exclusive jurisdiction in the repairing of public buildings. "These matters belong to the administrative and ministerial functions of the county court, and not to the judicial branch of their jurisdiction": *Vitt v. Owens*, 42 Mo. 512.

The action of the county court in making a subscription to the stock of a railroad company is administrative and discre-

tionary. There is no imperative obligation to make it: *St. Joseph etc. R. R. Co. v. Buchanan County*, 39 Mo. 485.

We have held at this term, in *Marion County v. Phillips*, 45 Mo. 75, that a settlement with the county collector was not a judicial act, but that of the public agents of the county with one of its officers; and the general question is also considered. The case of *St. Joseph etc. R. R. Co. v. Buchanan County*, *supra*, expressly decides the case at bar; and all the cases are inconsistent with the idea that the exercise of a discretionary power, given by law to the county court of Saline County, if it be given to make a subscription to the stock of a railroad, can be, in any sense, a judicial proceeding. A court has no discretion, but must render judgment according to the facts and the law; while this subscription might have been made or refused. The judges were bound, it is true, to act with good judgment, judiciously; but exercising a sound judgment is by no means synonymous with rendering judgment, and acting judiciously is not always acting judicially.

Counsel press upon our consideration the authority of *Robinson v. Board of Supervisors of Sacramento*, 16 Cal. 208, where the action of the board in raising the salaries of certain clerks was held by a majority of the court to be judicial, and subject to be reviewed on *certiorari*,—justices Baldwin and Cope constituting the majority, and Chief Justice Field dissenting. Justice Baldwin gives a long opinion, while Chief Justice Field simply says that he regards the ordinance as a mere legislative act, involving in its passage no judicial functions. I have examined the authorities cited in support of the opinion of the majority, and upon which it was expressly based, contrary, as they said, to the original opinion of the judges, and am more than ever impressed with the jumble and uncertainty in which this subject has been involved in our most respectable courts. Among the authorities relied on was *Supervisors of Onondaga v. Briggs*, 2 Denio, 26, in which the plaintiff had prosecuted the defendant to recover back fees illegally charged and paid him as county attorney. His bills had been annually taxed by a supreme court commissioner, upon notice to the chairman of the board of supervisors, and regularly audited and paid by the board. The supreme court held that no part of the sums so paid him could be recovered back, and gave the following conclusions of law as applicable to the case: "1. That the taxation was a judicial determination of the matter by officers duly authorized to adjudicate

upon it, and consequently, that the taxation cannot be set aside or disregarded in this collateral action; 2. But if the taxation is not conclusive, then the matter has been adjudicated by the board of supervisors, who had ample authority to decide it, and their determination is conclusive upon both parties, and especially upon themselves; and 3. The plaintiffs have voluntarily paid the money, with a full knowledge of all the facts, and cannot, therefore, recover it back."

The supreme court of California must have relied upon the second proposition, and construed it as holding that the board of supervisors, in auditing claims against the county, acts judicially, and that their action has the force of a judgment. If that was intended, it certainly is not the law of Missouri. Our county courts are the auditing boards of the several counties, and the statute goes so far as to provide for an appeal to the circuit court if the account is rejected: Gen. Stats. 1865, c. 38, sec. 36. Yet our courts do not hesitate to entertain suits against counties upon rejected claims, which would be absurd if their action had the force of a judgment. So, also, this court issues a *mandamus* against county courts in a proper case, commanding them to pay rejected accounts, which is utterly inconsistent with their judicial character: *State v. Buchanan County Court*, 41 Mo. 254.

The following extract from an opinion of Judge Cowen, in one of the cases cited in support of *Robinson v. Board of Supervisors of Sacramento*, *supra*, is very pertinent to the general question: "The power to interfere by *certiorari* is laid down very broadly by some *dicta* importing that all infringement of rights by persons legally clothed with authority to act, but who exercise that authority illegally, may be corrected by *certiorari*. . . . None of these cases, however, in which this language is used, and none which were referred to by the learned judges using it, have gone beyond a review of judicial decisions. Taking these *dicta* in the abstract, we might remove every by-law or other corporate act of every corporation in the state. *Parks v. Mayor etc. of Boston*, 8 Pick. 225, held that when the mayor and alderman had a right to take property for laying out or widening a street, whenever in their opinion it was necessary, the taking was an exercise of judicial power. But no other case, I think, has gone so far; and a liberal application of that decision would seem to take in every act which a corporation can do under any statute power whatever. It was said the corporation was

required to adjudicate on the necessity of taking property; but the same thing may be said of every act which a corporation may do under the most common power, even affixing their corporate seal." And this most learned of judges goes on to account for their erroneous opinion, from the fact that our courts have been misled by English decisions in regard to commissioners of sewers, who constitute a court of record, and whose acts are judicial: *In the Matter of Mt. Morris Square*, 2 Hill, 22. Since the hearing in *Robinson v. Board etc. of Sacramento*, *supra*, the supreme court of New York, in *People v. Supervisors of Livingston County*, 43 Barb. 232, follows up the matter of Mt. Morris Square, in restricting the operation of the writ, and condemning the looseness of the earlier decisions: See also *People v. Board of Health etc.*, 33 Id. 346.

If we were to entertain jurisdiction to review by *certiorari* the action of the county court of Saline upon a discretionary matter, and one involving no judicial functions, I know not what proceeding of county and city authorities might not be brought before us. Counsel are aware of the labor involved to keep down our growing docket, and can readily imagine its condition if we were to assume the power of revising the ministerial and legislative acts of all public agents in the state. Still, had we the jurisdiction, the matter of convenience to the people and bond-holders of Saline, suggested by counsel, would be a proper matter of consideration, as this is a discretionary writ, and not a writ of right; but as it is, ultimate confusion, rather than convenience, would follow such a breaking down of the land-marks of the law.

The motion for the writ was granted without hearing; but the proceedings sought to be reviewed not being judicial, the writ is quashed.

The other judges concurred.

CERTIORARI, WHAT MAY BE REVIEWED ON: *Jackson v. People*, 77 Am. Dec. 491, and note 497; is a discretionary writ: *Matter of Landis*, 80 Id. 85, and note 87; and see *Bergen v. Riggs*, 89 Id. 335, and note 337.

JUDICIAL AND MINISTERIAL ACTS DISTINGUISHED: *Flournoy v. City of Jeffersonville*, 79 Am. Dec. 468, and extended note 472.

THE PRINCIPAL CASE IS CITED to the point that *certiorari* will not lie to review the administrative action of the county court, in *State v. Saline County Court*, 51 Mo. 368, 378.

O'FLAHERTY v. UNION RAILWAY COMPANY.

[45 MISSOURI, 70.]

IT SHOULD BE LEFT TO JURY TO SAY, IN ACTION FOR DAMAGES ON ACCOUNT OF NEGLIGENCE, whether, notwithstanding the imprudence or neglect of the injured person, the defendant could not, in the exercise of reasonable care and diligence, have prevented the injury.

IN DETERMINING WHAT WOULD BE BAR TO ACTION ON GROUND OF CONTRIBUTORY NEGLIGENCE, the same rigid rule would not be applied to an infant, idiot, or insane person, as to one who had arrived at years of ordinary judgment and discretion. All that is necessary to give a right of action for an injury inflicted is that the injured person shall have exercised care and prudence equal to his capacity.

TO CONSTITUTE NEGLIGENCE IN PARENTS, PRECLUDING RECOVERY FOR INJURIES TO THEIR CHILDREN, there must be an omission of such care as persons of ordinary prudence exercise and deem adequate in the care of children.

ACTION for damages on account of negligence. The opinion states the case.

Cline, Jamison, and Day, for the appellant.

McBride, for the respondent.

By Court, WAGNER, J. This was an action by plaintiffs, as parents, to recover from defendants, an incorporated street-railroad company, the statutory penalty of five thousand dollars for killing their child, a little girl aged about two years and eight months. The evidence shows that the accident occurred on Carr Street, in the city of St. Louis; that the mother of the child dressed it, and sent it, under the protection of an elder sister, about eight years of age, to a lot across the street to play and get fresh air; that after being there for a time, the child, unobserved by its elder sister, escaped, and undertook to make its way home across the street. While crossing the street, and on the railway track, one of defendant's cars came along and ran over it, completely crushing its skull. It is also most clearly established by the testimony that the car was being driven at a rapid rate. Some of the witnesses say that the team was running; others, that it was going at a very fast trot, and that the driver, instead of looking ahead, and having his hand on the brake, in order to avoid accidents, was looking behind through the car, and holding on the dashboard to maintain his position. When the car was from thirty to fifty feet distant from the child, there was a woman looking out of an upper story window on the street, who saw the danger and cried out, trying to give the alarm to the driver; but

his mind was diverted to another direction, and no effort was made to stop the car till the child was run over and killed outright. It further seems that the street over which the car was traveling was an up-hill grade, and had the car been driven with proper speed, and had the driver exercised prudence, management, and care, the accident might easily have been avoided, and the child's life saved.

On behalf of the plaintiff, the court, in substance, instructed the jury that if the child's death was caused or occasioned by the negligence, carelessness, or unskillfulness of the driver, servant, or employee of the defendant, whilst running its car on the railroad, and whilst the same was in his charge as driver, and without negligence on the part of the child or its parents, then the jury should find for the plaintiffs; that although the jury might believe from the evidence that the plaintiffs or their deceased child were guilty of neglect or imprudence which contributed remotely to the death of the child, yet if the servant, employee, or driver of the defendant was guilty of misconduct or carelessness in the management of the defendant's car, which misconduct or carelessness was the immediate cause of the death of the deceased, and with the exercise of ordinary prudence and care on the part of said servant, employee, or driver, the death of the child might have been avoided, then the defendant was liable. To these instructions the defendant at the time excepted.

For the defendant, the court instructed the jury that before the plaintiffs could recover in the case, they must establish affirmatively two facts, to wit: 1. That the deceased child came to its death from the careless acts or conduct of defendant's agents or servants in the management of its car; 2. That neither of the plaintiffs, nor the little girl in charge of the deceased child, nor deceased child itself, was guilty of any negligence or carelessness immediately contributing to the injury and death of the child.

The defendant asked two additional instructions. The first was, that if the jury found from the evidence that the deceased child was but two years and eight or ten months old, and that it was sent upon the streets in the city of St. Louis by its mother, in charge of a sister eight years old, and while thus attended, it was left alone upon the streets, or was permitted to go out of the yard where its sister was engaged at play, and while thus alone it attempted to cross a public thoroughfare in said city, traversed by street-cars and other vehicles drawn

by horses, unattended by any one sufficiently near to protect it from harm, and in so doing received the injuries complained of, from which it died, then the plaintiffs could not recover. The second instruction was, in substance, that if the deceased child was but two years and eight or ten months old, and attempted to cross from the north side to the south side of Carr Street, unattended by any one in charge of it or sufficiently near to it to give it aid, care, and protection in crossing said street, and that said street was a public thoroughfare used for street-cars and other vehicles drawn by horses, and that said child, while so attempting to cross said street, came in contact with the horses or car of defendant, and was knocked down and run over, then these facts constituted such carelessness as would prevent the plaintiffs from recovering. The last two instructions the court refused to give, and the defendant excepted. The jury found a verdict for the plaintiffs, on which judgment was rendered, and the defendant appealed.

The instructions given for the plaintiff are wholly unobjectionable, for it is the established doctrine of this court that in an action for damages on account of negligence or unskillfulness, it should be left to the jury to say whether, notwithstanding the imprudence or neglect of the injured person, the defendant could not, in the exercise of reasonable care and diligence, have prevented the injury. The instruction given for the defendant was sufficiently favorable to it, and went as far as the prior rulings in this state on the subject would permit. But the instructions refused were based on an entirely different theory, and asked the court to declare, as matter of law, that permitting the child to go out under the circumstances as detailed was of itself negligence, and would preclude a recovery.

In discussing the question of infantile responsibility in a case in this court, we held that the same rigid rule, in determining what would be a bar to an action on the ground of contributory negligence, would not be applied to an infant, an idiot, or an insane person, as to one who had arrived at an age to possess ordinary judgment and discretion. All that was necessary to give a right of action for an injury inflicted by the defendant was, that the injured person should have exercised care and prudence equal to his capacity: *Boland v. Missouri R. R. Co.*, 36 Mo. 484. The young and the old, the lame and infirm, are entitled to the use of the streets, and more care must be exercised towards them by persons controlling or

managing cars and vehicles than towards those who have better powers of motion. A child or young person cannot be expected to possess that vigilant foresight which would be exacted of a person of maturer years. But it does not thence follow that they are to be denied the privilege of going on the streets, and if they do so go, they may be killed with impunity. In the case of a child two or three years old, no knowledge or foresight can be expected. This fact persons who traverse the streets in conducting cars are bound to know, and govern their actions accordingly. In *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455, the action was for injuries done to an infant three or four years old. The proof showed that the child was left in the house with the front door locked; that he got out into the street through the front window, and then went down one street and crossed another, in front of the mules drawing the car; that he got out of the way of the mules, but was struck by the dash-board of the car and knocked down, and received the injury; that the driver of the car had caught a pigeon, which he had in his hands, and was sitting down looking at it, having wound his lines around the brake, and was paying no attention to his team, or to what might be on the track, at the time of approaching the place of collision, nor until after the occurrence. There the inference is that the team was going along leisurely, and the driver was simply guilty of inattention; but had he been at his post, vigilantly performing his duty, the accident might and would have been avoided. Yet the court held that the child being in the street under such circumstances would not warrant the conclusion, as matter of law, that the parent was guilty of negligence, and at most the question of fact should be submitted to the jury.

I think it may be stated as a sound proposition that to constitute negligence in the parents there must be an omission of such care as persons of ordinary prudence exercise and deem adequate for the required purpose. In the present case it appears that the unfortunate little child was never permitted to go out on the streets alone, unattended, but it was frequently sent out under the care of its sister. Although the sister was but eight years old, she might have been entirely adequate to afford it protection under ordinary circumstances. It is the only attendance many people are capable of affording their children. To say that it is negligence to permit a child to go out to play unless it is accompanied by a grown attendant, would be to hold that free air and exercise should only be

enjoyed by the wealthy who are able to employ such attendants, and would amount to a denial of these blessings to the poor.

The evidence is clear that the driver was guilty of the most reckless misconduct and criminal disregard of human life. Had he been driving in moderation, and attentive to those duties which his situation demanded, this accident could never have happened. But the whole question was fairly submitted to the jury, and they have passed upon it by their verdict. That verdict can only be disturbed by attempting to withdraw this case from the operation of the established law of this state, and we do not feel particularly called upon to invent new rules for the purpose of screening and protecting wrong-doers. I think the judgment is right, and therefore advise an affirmance.

Judgment affirmed.

The other judges concurred.

CONTRIBUTORY NEGLIGENCE, WHAT IS, AND EFFECT OF: See *Daley v. Norwich etc. R. R. Co.*, 68 Am. Dec. 413, and note 421; *Simmons v. Steamboat Co.*, 93 Id. 99; *Baltimore etc. R. R. Co. v. State*, 96 Id. 528; *Pittsburgh etc. R. R. Co. v. Bamstead*, 95 Id. 539; *Wilmot v. Howard*, 94 Id. 338.

WHAT IS NEGLIGENCE DEPENDS UPON PARTICULAR FACTS AND CIRCUMSTANCES OF EACH CASE; and all facts and circumstances tending to show negligence are proper to be considered by the jury: *Northern Central R. R. Co. v. State*, 96 Am. Dec. 545, and cases collected in note 553; *Frankford Turnpike Co. v. Philadelphia R. R. Co.*, 93 Id. 706, and note 713; *Ernst v. Hudson R. R. Co.*, 90 Id. 761.

THE PRINCIPAL CASE IS CITED and approved in respect to the doctrine of contributory negligence, in *Duffy v. Missouri Pacific R'y Co.*, 19 Mo. App. 389; *Fink v. Missouri Furnace Co.*, 10 Id. 76; *Farris v. Railway Co.*, 80 Mo. 331; *Frick v. Railway Co.*, 75 Id. 547.

VASTINE v. WILDING.

[45 MISSOURI, 89.]

MERE POSSESSION BY THIRD PARTY OF UNINDORSED NEGOTIABLE PAPER, payable to the order of the payee therein named, is not even *prima facie* evidence of title in the holder as against such payee.

INSTRUCTION IS PRACTICALLY REFUSED which is not marked by the court as either given or refused.

PROCEEDING under the statute to recover possession of a certificate of deposit. The opinion states the case.

Lackland, Martin, and Lackland, for the appellant.

Bland and Thornton, for the respondent.

By Court, CURIER, J. This proceeding was instituted under the statute (Gen. Stats. 1865, c. 128, secs. 17, 18), to recover possession of a certificate of deposit issued by the United States Savings Institution of St. Louis to August Berger, deceased. It was unindorsed, and reads as follows:—

“ST. LOUIS, MO., March 12, 1866.

“August Berger has deposited in this office one thousand dollars, payable to the order of himself on the return of this certificate, six months after date, with interest at the rate of five per cent per annum.”

Berger died, and the plaintiff, as public administrator, took charge of his estate. The plaintiff had no knowledge of the certificate of deposit sued for until it was brought to him by the defendant, who solicited his assistance in collecting it, the bank having refused to pay it without the indorsement of Berger's administrator. The certificate had been found among the papers of Lewis Chrisner by his administratrix. Chrisner died in Belleville, Illinois, May 6, 1867. His administratrix delivered the papers to the defendant for the purpose of collection. How it came among Chrisner's papers in no way appeared, nor was there any testimony tending to throw any light upon the question of its ownership beyond what appears upon its face, and the fact of its possession by Chrisner. The plaintiff demanded possession of it as belonging to the estate of Berger; but the defendant refused to surrender the possession, claiming to hold the certificate as the property of Chrisner's estate. Upon this refusal the present proceedings were instituted.

If the title and ownership of the certificate and the fund it represented were in the plaintiff, as Berger's administrator, at the time of the demand, the defendant's subsequent possession, in opposition and hostility to the plaintiff's right, was, in the sense of the statute, unlawful, and warranted this suit. The real and substantial question for consideration, therefore, is this: Whose was that certificate of deposit? Was the title in the administrator of Berger, or was it in the administratrix of Chrisner?

The certificate itself establishes beyond controversy the fact that Berger was its original owner; that he deposited the fund, and as evidence of his title took a certificate of deposit

payable to his own order. His title thus acquired must be presumed to continue until a divestment of it is shown; and a mere manual delivery of the paper without indorsement, and unaccompanied with evidence of a consideration paid, would not of itself pass the title. Even in case of personal chattels, as distinguished from choses in action, the presumption of ownership is with the party once shown to have had the title, until an alienation is shown; and the party relying on the fact of such alienation must prove it. So it was decided in *Magee v. Scott*, 9 Cush. 150 [55 Am. Dec. 49], and that decision expresses the recognized doctrine on this subject. In commenting upon the facts of that case, Shaw, C. J., says: "It is to be regretted that the facts showing the relation of the parties, and the circumstances under which the goods admitted to have been the property of the plaintiff came into the possession of the defendant, are not stated, in order to show the application of the rule of law laid down by the court. Such circumstances will usually indicate what was the nature and character of such change of possession, whether in consequence of a sale or temporary loan, or how. The plaintiff is proved to be the owner of the property, and the right of property will continue until a change proved, as by sale, lien, or voluntary loan. Whoever relies on such change must prove it; the proof lies on him. All that appears in the present case is that the property came into the possession of the defendant with the plaintiff's consent. How? On what trust or contract? This does not appear." And it was decided accordingly that the presumption of title in the plaintiff, founded on his original ownership, continued and prevailed over any presumption of title in the defendant arising out of his naked, unexplained possession.

The principle involved in that decision, applied to the facts of the present litigation, is decisive of the issue. The same obscurity hangs over Chrisner's possession of the certificate that hung over the defendant's possession of the personal property forming the subject of contention in *Magee v. Scott*, *supra*.

Why did he have it? How? On what trust or contract? None of these questions are answered. There is nothing but the naked, unexplained possession to justify the pretensions of the Chrisner estate to ownership. If the fact of once having been the owner of personal chattels raises the presumption of a continued title, as in *Magee v. Scott*, *supra*, how decisive should that presumption be in a case like the present, when

the paper in dispute points out and designates the plaintiff's intestate as being the true owner, and having upon it no mark or sign suggestive of a change of title.

I have examined all the accessible authorities cited in the brief of the defendant's counsel, and I find that not one of them asserts the doctrine that the possession of an unindorsed negotiable note, bill, or certificate of deposit, payable to the order of the payee therein named, is *prima facie* evidence of title in the holder as against the payee named in the body of the instrument, the holder furnishing no extrinsic evidence of his equitable title or interest. I apprehend no such case can be found. The Missouri cases referred to raise questions of practice, and the decisions at most have but a remote bearing upon the present inquiry.

Possession is *prima facie* evidence of title when paper is made payable to bearer, as bank notes; or where, if payable to order, the paper has once been properly indorsed and put in circulation. The cases referred to by defendant's counsel are mostly of this character, or concern personal chattels.

The remark in Parsons (2 Parsons on Notes and Bills, 444), that the "mere possession of an unindorsed note is *prima facie* evidence of title in the holder," is founded on *Parham v. Murphee*, 4 Mart., N. S., 355. The point involved in that case had reference to the authority of the plaintiff's attorney to make the affidavit on which a writ of attachment was sued out. It was insisted that the possession of the note sued on, although unindorsed, was *prima facie* evidence that the attorney was the plaintiff's agent or attorney in fact. The court decided adversely to this claim.

Possession of unindorsed negotiable paper may well be received as *prima facie* evidence as against a stranger to the title; but is the naked and unexplained possession of such paper *prima facie* evidence, as against the payee therein named? It does not appear ever to have been so held, and we are not prepared to make a precedent of that character. Nor do we see any sound reason for doing so. But it is urged that the court committed error by reason of its non-action upon an instruction asked by the defendant at the conclusion of the plaintiff's case, to the effect that the plaintiff was not entitled to recover upon the proofs. The record states that this instruction was neither given nor refused; but the record also shows that the trial proceeded, and that the defendant put in his evidence. The action taken was a practical refusal of the

instruction. The non-action of the court in omitting to write a refusal upon the instruction seems to have been the result of inadvertence, and not of intention. The judgment was for the right party, and the defendant does not appear to have been injured by the error complained of. A reversal on that point is not therefore warranted. It is assumed in the brief of the defendant's counsel that the certificate of deposit in question is subject to the control and jurisdiction of the probate court of St. Clair County, Illinois. The record shows no such fact, and it is therefore unnecessary to consider whether the fact supposed is of any materiality or not.

The views presented lead to an affirmance of the judgment, which is directed.

BLISS, J., concurred.

WAGNER, J., was absent.

POSSESSION IS PRIMA FACIE EVIDENCE OF TITLE TO NOTE PAYABLE TO BEARER: *Pettee v. Prout*, 63 Am. Dec. 778, and cases collected in note 779; *Hoscomb v. Beach*, 112 Mass. 450; *Railroad Company v. National Bank*, 102 U. S. 38.

HOLDER OF NEGOTIABLE PROMISSORY NOTE INDORSED IN BLANK has a *prima facie* title thereto, which, in the absence of proof of *mala fides*, will entitle him to sue on it in his own name: *Kunkel v. Spooner*, 66 Am. Dec. 332; *Way v. Richardson*, 63 Id. 760; and see *Clapp v. County of Cedar*, 68 Id. 678; *Emanuel v. White*, 69 Id. 385.

RIGHTS OF POSSESSOR OF UNINDORSED NEGOTIABLE PAPER, NOT MADE PAYABLE TO BEARER. — Upon this subject the decisions are to some extent conflicting. It has been held that the mere possession of an undorsed promissory note payable to another will not authorize a payment to the holder, when the note is not exhibited to the maker: *Hannon v. Sullivan*, 3 Mo. App. 583. It has likewise been held that the mere possession of a bond is not such an evidence of property as will justify a payment to the holder, without authority, express or implied, from the owner to collect it: *Brown v. Taylor*, 32 Gratt. 135; and that a person having no other evidence of right than the mere possession of a bond will not be permitted to use the name of the obligee in the prosecution of a suit on it: *Belt v. Wilson*, 6 J. J. Marsh. 495; but compare *Morrison v. Grubb*, 23 Gratt. 342. In New York, the mere fact that a person, claiming to be the agent of the payee of a promissory note, has the note in his possession, undorsed, does not confer upon him an apparent authority to receive payments thereon: *Wardrop v. Dunlop*, 1 Hun, 325, following *Doubleday v. Kress*, 50 N. Y. 410; S. C., 10 Am. Rep. 502. In the case last cited, action was brought to recover the amount of a promissory note made by the defendant, and payable to the order of the plaintiff. The plaintiff's son-in-law, one Murray, upon the representation that the defendant wished to pay the interest and renew the note, obtained it from her, and by means of a forged order attached procured the money thereon. It was held that the mere possession of the note by the assumed agent, Murray, undorsed, without any other sustaining facts, was not sufficient to author-

ize payment to him. And see *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404, affirming S. C., 10 N. Y. Week. Dig. 315. So, in an Indiana case, C. brought an action against H. before a justice of the peace, on a promissory note made by H., payable to the order of A. There was no indorsement of the note from A. to C., and it was held that the filing of the note as the only cause of action was insufficient, and that the case was not one of a mere defect of parties: *Hull v. Conover*, 35 Ind. 372. And in accordance with these decisions is the ruling of the supreme court of Ohio, that the rightful possession of a check, made payable to the order of a particular person, confers no authority on the drawee to pay the same to the person having such possession, without the genuine indorsement of the payee: *Dodge v. Nat. Exchange Bank*, 30 Ohio St. 1; S. C. before, 20 Id. 234. So it is held by the supreme court of Michigan that the delivery of negotiable paper without indorsement does not amount to a transfer of the title thereto, unless by way of equitable assignment. And as such an assignment is not, like a negotiable transfer, discharged of equities, any person in possession thereby cannot confer by delivery any better title than he owns, and is not authorized to sue on the paper in his own name: *Minor v. Bewick*, 55 Mich. 491; and see *Brown v. Nourse*, 55 Me. 230; S. C., 92 Am. Dec. 583; *Follier v. Schroder*, 19 La. Ann. 17; S. C., 92 Am. Dec. 521, and note 526.

The decisions noticed above are in general accord with the doctrine of the principal case. But a different view is taken in North Carolina, and the supreme court of that state has decided that the possession of an unindorsed negotiable note or bond, not payable to bearer, raises a presumption that the person producing it is the real and rightful owner, and entitled to the money due from the promisor: *Jackson v. Love*, 82 N. C. 405. Such a presumption, it is said, seems necessary and expedient under the method of civil procedure in that state, which requires civil actions generally to be prosecuted in the name of the real party in interest, and that the legal and equitable rights of litigants shall be administered in the same action, when need be: *Merrimon, J., in Holly v. Holly*, 94 Id. 670, 673. Nevertheless, it is a presumption which is only evidence against the defendant in an action upon the note, and, as a mere presumption, cannot avail the holder in an action brought against him by the legal owner: *Robertson v. Dunn*, 87 Id. 191; the presumption does not arise as between the holder and the payee, who has the legal title, but only as between the holder and payor: *Holly v. Holly*, 94 Id. 670; and see *Pugh v. Grant*, 86 Id. 39.

HILSDORF v. CITY OF ST. LOUIS.

[45 MISSOURI, 94.]

CORPORATIONS ARE HELD TO SAME LIABILITY AS INDIVIDUALS, and if an agent or servant of a corporation, in the line of his employment, be guilty of negligence or commit a wrong, the corporation is responsible in damages.

RULE THAT PRESCRIBES RESPONSIBILITY OF PRINCIPALS FOR ACTS OF OTHERS is based upon their power of control. If the master cannot command the servant, the acts of the servant are clearly not his.

WHERE MAYOR HAS NO POWER TO CONTRACT FOR REMOVAL OF DEAD ANIMALS FROM CITY, the city cannot be held liable for damages caused

by the deposit of the carcasses upon private premises by a party who had agreed with the mayor to remove them.

FACT THAT MUNICIPAL CORPORATION HAS MADE CONTRACT WITH CERTAIN PERSONS FOR REMOVAL OF CARCASSES of all dead animals does not exonerate the owner from any responsibility regarding the removal of such nuisances, when such contract cannot or is not complied with.

THE opinion states the case.

Reber, for appellant City of St. Louis.

Glover and Shepley, for appellant St. Louis Railroad Company.

Cline, Jamison, and Day, for the respondent.

By Court, BLISS, J. In May, 1866, the stables of the St. Louis Railroad Company were consumed by fire, and some 140 mules, the property of the company, were destroyed, and their carcasses more or less burned. The weather was warm, and it became necessary at once to remove them.

By article 9, of ordinance 4894, establishing and regulating the health department (Revised Ordinances 1866, pp. 451-453), it is made the duty of street inspectors to report to the clerk of the board of health every carcass they may find, and the clerk shall enter the report in a book, designating the locality, and the exclusive privilege is given to A. Feger and G. Futterknecht, for a period covering the time of this fire, to remove and appropriate said carcasses. These men bind themselves to remove all such animals from the city within six hours after notice, and it is made the duty of every owner of any dead animal who desires to convert it to his own use to do so within twelve hours after its death, or, if he does not desire to do so, to notify said clerk or some street inspector. The city pays nothing to these contractors, and the only consideration received by them is the privilege of converting the bodies to their own use, which is done at their manufactory of soap-grease outside the city limits.

On the morning of the loss by the railroad company, the clerk of the board of health received from the company the proper notice; and one Settle, employed by the contractors to remove carcasses, appeared for the purpose of entering upon the performance of his duty, and met the mayor upon the ground. The fire occurred in the south part of the city, and the contractors' works are north of it, and seven miles from the place of the fire, and it became at once evident that these carcasses could not be conveyed to them. They had already

become offensive, and were rapidly becoming more so, and their transportation through the city, even if it could be done at once, would have been a serious nuisance. But Settle had no means of so removing them, and informed the mayor that it would take him a week to do the whole job. The mayor then obtained a proposition from him take them below the arsenal and throw them into the river for \$1.25 per head, which proposition was communicated to the agents of the railroad company, who assented to it, and afterwards paid Settle his bill for the work. The river was very high at the time, and overflowed a stone quarry belonging to the plaintiff so as wholly to conceal it; and finding a road to the river bank where was situated this quarry, and it being more convenient of access than where he was directed to go by the mayor, Settle threw these carcasses into the river directly over this quarry. The current did not strike them, and they sank into the quarry, and the plaintiff claims that, being mixed with and covered by the sediment that filled his excavation, he could not reopen his quarry, and thus wholly lost the use of it. He recovered a judgment, which was affirmed at general term, and defendants appeal.

The defendants made separate defenses, and after the evidence was submitted, counsel for the city asked the court to instruct the jury that, on the facts proved, the plaintiff could not recover against it. This instruction the court refused to give, and thus the question is raised whether, under the facts claimed to be proved by the plaintiff, the city is liable to him for the damage arising from the acts of Settle.

If the city is thus liable, the liability arises by virtue of its relation to the mayor and to Settle, or to one of them. The responsibility of an employer for the act of those in his service depends upon the character of those acts, and especially upon their relation to the service. It would not be right to charge him for the torts of his servant that had no relation to his employment. The contract of service is no guaranty of general good conduct as a citizen, but any act done in pursuance of the contract of hire will in general charge the principal as well as the agent or servant. Corporations, whether municipal or aggregate, are now held to the same liability as individuals, and will not be permitted to screen themselves behind the plea that they are impersonal, and their acts are but the acts of individuals; and if an agent or servant of a corporation, in the line of his employment, shall be guilty of negligence or

commit a wrong, the corporation is responsible in damages: See Angell and Ames on Corporations, secs. 385-388, and the numerous cases cited in the notes.

In the case at bar, the mayor, it appears, acted with zeal and energy to save the public from the effects of the terrible nuisance upon the premises of the railroad company. But he cannot be said to have been acting on behalf of the city, but rather as a good citizen, whose other heavy responsibilities were a spur to look after the public welfare generally. The general duty of abating nuisances is imposed by article 1 of said ordinance 4894, especially by sections 6 and 7, upon the board of health, and the street inspectors under its direction, and it does not appear that the mayor has anything to do with the matter. It is not necessary to say that an emergency could or could not arise, as if the board of health should grossly neglect its duty, and the city contractors for removing carcasses, also theirs, or there was other pressing necessity, in which the mayor, as the general executive, and by virtue of the powers given him by charter, might not so act as to bind the city, although he performed the duties of other departments. But in the present case there was no such emergency. The matter did not come before the board of health, nor does it appear that the mayor undertook to bind the city, or that he acted officially in the premises. But if he did, he went beyond his authority as mayor, and his acts were not those of the city: *Thayer v. Boston*, 19 Pick. 511 [31 Am. Dec. 157].

The city, then, if responsible at all, became so by the acts and relation of Settle; and the inquiry at once arises, whether Settle had any such relation to it that it ought to be held responsible for his negligence or wrong-doing. He was, as we have seen, in the employment of Feger and Futterknecht, the contractors for removing carcasses, and his employers held an independent contract with the city, and were in no way under the control or direction of its officers. They were bound to remove all carcasses in a specific manner, and neither the mayor nor board of health, nor any person or body representing the city, could interfere, or in any manner control their acts. The common council could, by ordinance, terminate their contract, but during its existence had no power over them. I cannot see, then, upon what principle of reason or justice the city can be held responsible for their acts.

The rule that prescribes the responsibility of principals, whether private persons or corporations, for the acts of others,

is based upon their power of control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not master, for the relation implied by that term is one of power, of command; and if a principal cannot control his agent, he is not an agent, but holds some other or additional relation. In neither case can the maxim *respondeat superior* apply to them, for there is no superior to respond. The city authorities of St. Louis had no power to control the action of Feger and Futterknecht under their contract; and having no such power, they cannot be responsible for it; and such are the best authorities.

The case of *Bush v. Steinman*, 1 Bos. & P. 404, though followed in a few other cases, is not now generally regarded as authority. It made employers responsible for the acts of job contractors over which they had no control, and for many years the case embarrassed the courts, and caused artificial distinctions to be made, in order to reconcile it to the principles of justice. But it is now generally disregarded, and its doctrine has been expressly disclaimed by several decisions in our own state. In *Barry v. City*, 17 Mo. 121, the subject underwent a thorough discussion, and the leading cases were reviewed by the court. The city had let a contract to build a sewer, the contractor having sole control of the job until accepted, and it was held that the city was not responsible for the negligence of the contractor in its construction, the relation of master and servant not existing. In *Morgan v. Truman*, 22 Id. 533, defendant was a warehouseman, and plaintiff's goods were lost by fire caused by the negligence of a person employed by defendant in boiling the tar to make a composition roof. The responsibility of defendant was fastened upon him, upon the ground that his employee, who was the overseer of the work, and hired others to work under him, was engaged by the day, and subject to the constant control of the defendant. The case was distinguished from those where the work had been let by the job, where it was admitted no such responsibility would have been incurred.

The suggestion that Settle did not remove these carcasses under this contract of his employers, but by special direction of the mayor, only brings us back to the first proposition, that the mayor had no authority to give any such direction; nor does it appear that he acted officially, but, as we shall presently see, effected between Settle and the railroad company an arrangement for their removal. The liability of the railroad

company for the negligence or wrongful act of Settle was found by the jury, upon the fact that he was directly employed by the company to remove the nuisance. The instructions given by the court were very favorable to this defendant, and had not the city been included in the judgment, there would have been no error in the record. The mayor testifies that before making any arrangements with Settle, he obtained his price for the removal, went to the office of the company, and the officer in charge acceded to the terms, which were at once communicated to Settle, and after the job was done paid the price agreed upon, including the carriage hire of the mayor. Could any employment and service be made clearer? But the president of the company testifies that the payment of this bill was a gratuity; that they paid it to please Mr. Thomas, who had been kind to them. This view argues a singular insensibility to their obligations in the premises. In consequence of the company's misfortune, a great nuisance was created upon their premises. This nuisance they were under an imperative obligation to remove. It was rapidly becoming intolerable, would soon have driven every person out of the neighborhood, and the company would have been responsible for the damage suffered. The fact that the city has made a contract for the removal of such nuisances does not exonerate the owner from responsibility in regard to them when that contract cannot be or is not complied with; nor can the obligation he is under to let the contractor have the carcass if he does not himself appropriate it within twelve hours, if the contractor shall come for it, be construed to discharge all responsibility on his part. The company but performed a plain duty in employing Settle to remove the carcasses. The railroad company, then, made such an arrangement for the removal of their dead stock as they were bound to do; they honestly paid for the work, the person employed became their servant, and they were responsible for the negligent manner in which he performed the job, and for any wrong committed in the course of the business in which he was employed.

The judgment, being against both the city and the railroad company, when it should have been against the railroad company alone, is reversed, and the cause remanded.

The other judges concurred.

LIABILITY OF MUNICIPAL CORPORATIONS GENERALLY: See *Stackhouse v. City of Lafayette*, 89 Am. Dec. 450, note 457; *Nevins v. City of Peoria*, 89

11. 392, and cases collected in note 401; *City of Richmond v. Long*, 94 Id. 461; *City of Pekin v. Newell*, 79 Id. 375, and note 379; *Mayor etc. v. Cullena*, 55 Id. 398, and note 400.

LIABILITY OF MUNICIPAL CORPORATION FOR ACTS OF OFFICERS whose duties are of a public nature: *Buttrick v. City of Lowell*, 79 Am. Dec. 721, and note 723; and see *Rounds v. City of Bangor*, 74 Id. 469; *Lorillard v. Town of Monroe*, 62 Id. 120, and note 124; *Mills v. Gleason*, 78 Id. 721, and note 729; *Sherbourne v. Yuba County*, 81 Id. 151, and note.

LIABILITY OF CITY FOR UNAUTHORIZED ACTS OF ITS OFFICERS. — It is stated as a general rule that a municipal corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*. It must further appear that they were expressly authorized to do the acts by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation: *Shaw, C. J.*, in *Thayer v. Boston*, 19 Pick. 511; S. C., 31 Am. Dec. 157, 161; approved in *Lee v. Sandy Hill*, 40 N. Y. 442; *Buffalo etc. Turnp. Co. v. Buffalo*, 58 Id. 639; *Chicago v. McGraw*, 75 Ill. 566; *Hamilton v. Fon du Lac*, 40 Wis. 50; *Wallace v. Menasha*, 48 Id. 82; *Sherman v. Grenada*, 51 Miss. 186; *Chandler v. Bay St. Louis*, 57 Id. 329; and see *Woodcock v. Calais*, 66 Me. 234. It is well settled that a municipal corporation cannot be held liable for injury resulting from an act done by its officers beyond its power and jurisdiction. If, therefore, the act complained of is in a strict sense *ultra vires*, that is, wholly outside of any of the powers possessed by the corporation, no such liability exists: *Browning v. Board of Commissioners*, 44 Ind. 11; *Haag v. Board of Commissioners*, 60 Id. 511; S. C., 28 Am. Rep. 654; *Cummins v. City of Seymour*, 79 Ind. 491; S. C., 41 Am. Rep. 618; *Board of Commissioners v. Duprez*, 87 Ind. 509; *Cooper v. Atlanta*, 53 Ga. 638; *City of Denver v. Boyer*, 7 Col. 113, 126. It is held that if the act done is committed outside of the authority and power of the corporation as conferred by statute, the corporation is not liable, whether its officers directed its performance, or it was done without any express direction or command: *Smith v. City of Rochester*, 76 N. Y. 506; *Horn v. Baltimore*, 30 Md. 218; *Chicago v. Turner*, 80 Ill. 419; *Hunt v. Booneville*, 65 Mo. 620; S. C., 27 Am. Rep. 299. And parties dealing with the agents or officers of a municipal corporation must at their peril take notice of the limits of the powers, both of the municipality and of those who assume to act as its agents or officers: *State v. Mayor etc.*, 29 Md. 85. Hence it is that the plea of *ultra vires* is used by those who are sued by such corporations, and the corporation itself may use it as a defense: Id.; and see *Cheeny v. Brookfield*, 60 Mo. 53; *Moore v. Mayor etc.*, 73 N. Y. 238. But the tendency of the later decisions is to hold corporations responsible for acts not strictly within their corporate powers, but done in their corporate name, and by officers of the corporation who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are *quasi criminal*, the corporation may be held to a pecuniary responsibility for them to the party injured: See *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202; *Copley v. Sewing Machine Co.*, 2 Wood, 494; *Reed v. Home Sav. Bank*, 130 Mass. 445; *Salt Lake City v. Hollister*, 6 Sup. Ct. Rep. 1055. In the case last cited, it was held that a municipal corporation cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the govern-

ment on such business or transaction, by whomsoever conducted: And see *McCready v. Guardians of Poor etc.*, 9 Serg. & R. 94.

In general, the liabilities of a municipal corporation for the acts of its officers or agents, within the scope of their employment, and within the scope of the powers of the corporation, are the same as those of a private corporation or individual: See *Maximilian v. Mayor etc.*, 62 N. Y. 160; S. C., 20 Am. Rep. 468; *Dayton v. Pease*, 4 Ohio St. 80; *Cincinnati v. Stone*, 5 Id. 38; *Cotes v. Davenport*, 9 Iowa, 227; *Templin v. Iowa City*, 14 Id. 59; *Waldron v. City of Haverhill*, 143 Mass. 582; *Kobs v. Minneapolis*, 22 Minn. 159. The doctrine of *respondent superior* applies, but the difficulty of determining who are officers and servants is much greater in the case of municipal corporations than in the case of private corporations or individuals, and has given rise to much discussion, and some seeming conflict in the decisions. Many of the cases make a distinction between acts performed by municipal officers or agents in the discharge of political or governmental duties, and acts performed by them in the discharge of purely municipal or corporate duties, the municipality being held liable for the latter, but not liable for the former: See *Wallace v. City of Menasha*, 48 Wis. 79; S. C., 33 Am. Rep. 804; *Oliver v. Worcester*, 102 Mass. 489; S. C., 3 Am. Rep. 485. Or otherwise expressed, the doctrine is, that if the officer or agent of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the acts of such officer or agent, the corporation is liable, as in the case of private corporations or individuals; but when the acts complained of were done in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts. In the former case, the rule of *respondent superior* governs; in the latter case, it does not: *Murtaugh v. St. Louis*, 44 Mo. 479; *Welsh v. Rutland*, 56 Vt. 228; S. C., 48 Am. Rep. 762; *Wilcox v. Chicago*, 107 Ill. 334; S. C., 47 Am. Rep. 434; *Robinson v. Evansville*, 87 Ind. 334; S. C., 44 Am. Rep. 770; *Summers v. Board of Commissioners*, 103 Ind. 262; S. C., 53 Am. Rep. 512; *Ogg v. Lansing*, 35 Iowa, 495; S. C., 11 Am. Rep. 499; *Bryant v. City of St. Paul*, 33 Minn. 289; S. C., 53 Am. Rep. 31; *Tindley v. Salem*, 137 Mass. 171; S. C., 50 Am. Rep. 289; *City of Richmond v. Long*, 17 Gratt. 375; S. C., 94 Am. Dec. 461; *Noble v. City of Richmond*, 31 Gratt. 279; *Orme v. City of Richmond*, 79 Va. 89; *Barnes v. District of Columbia*, 91 U. S. 540. But the principle of *respondent superior* also applies, and a city may be held liable for the acts of its officers in the performance of a public duty, if they are specially employed by the city for the particular work, and are not acting as public officers: *Woodcock v. Calais*, 66 Me. 234; *Mulcairns v. City of Janesville*, 67 Wis. 24; and see *New York etc. Lumber Co. v. Brooklyn*, 71 N. Y. 580, 584. Thus, as a general rule, a city is not liable for the acts of the officers of its fire department, unless made so by express statute: *Howard v. San Francisco*, 51 Cal. 52; *Greenwood v. Louisville*, 13 Bush, 226; S. C., 26 Am. Rep. 263; *Jewett v. New Haven*, 38 Conn. 368; S. C., 9 Am. Rep. 382; *Wheeler v. Cincinnati*, 19 Ohio St. 19; S. C., 2 Am. Rep. 368; *Black v. Columbia*, 19 S. C. 412; S. C., 45 Am. Rep. 785; *Simon v. Atlanta*, 67 Ga. 618; S. C., 44 Am. Rep. 739; *Thompson v. Mayor etc.*, 20 Jones & S. 427; *Terhune v. Mayor etc.*, 88 N. Y. 247, 251; yet the city is liable when the acts complained of are expressly authorized or ordered by the city government: *Burrill v. City of Augusta*, 78 Me. 118; S. C., 57 Am. Rep. 788. And it is well settled that a municipal corporation may ratify the unauthorized acts of its officers and agents when the corpo-

ration might legally have authorized such acts in the first instance: *Davis v. Mayor etc.*, 28 N. W. Rep. 526 (Mich.).

As illustrating the subject generally, it has recently been held that if a city, instead of leaving the duty of keeping the highways in repair to be performed by the officers and in the methods provided by the general laws, assumes to perform it by means of agents whom it may direct and control, it may be held responsible for the acts of those agents: *Waldron v. City of Haverhill*, 143 Mass. 582; and see *City of Logansport v. Dick*, 70 Ind. 65; S. C., 36 Am. Rep. 166; *Fitzgerald v. City of Binghampton*, 40 Hun. 332. So, although a city is not in general liable for injuries arising from the acts of a contractor in performing work under a contract between him and the city government, yet if the relation of master and servant is shown to exist between them, the rule is otherwise: See *Russell v. Columbia*, 74 Mo. 492; S. C., 41 Am. Rep. 325; *Blumb v. City of Kansas*, 84 Mo. 112; S. C., 54 Am. Rep. 87; *Herrington v. Lansingburgh*, 36 Hun. 598; *Vogel v. Mayor etc.*, 92 N. Y. 10; S. C., 44 Am. Rep. 349. A city is not liable for the acts of a board of health constituted a separate body by the charter, whether appointed by the legislature directly, or by the city in pursuance of the charter: *Bryant v. City of St. Paul*, 33 Minn. 289; S. C., 53 Am. Rep. 31; and to the same effect, see *Summers v. Board of Commissioners*, 103 Ind. 262; S. C., 53 Am. Rep. 512; *Ogg v. City of Lansing*, 35 Iowa, 496; S. C., 14 Am. Rep. 499; *Brown v. Vinahaven*, 65 Me. 402; *Spring v. Inhabitants etc.*, 137 Mass. 554; S. C., 50 Am. Rep. 334; nor is a city liable for the unlawful acts of violence of its police officers: *Kimball v. Boston*, 1 Allen, 417; *Cahwell v. City of Boone*, 51 Iowa, 687; S. C., 33 Am. Rep. 154; *Cook v. Mayor etc.*, 54 Ga. 468; *Burch v. Hardwick*, 30 Gratt. 24; S. C., 32 Am. Rep. 640; *Elliott v. Philadelphia*, 75 Pa. St. 342; S. C., 15 Am. Rep. 591.

Where, for the purpose of improving its sanitary condition, a city collects and deposits in one place all the carcasses, garbage, excrement, etc., and buries them there, the city cannot be held liable to an individual for sickness caused thereby. The acts out of which the nuisance originated having been performed in the interest of the public, and not for the private advantage or emolument of the municipality, no liability attached; *City of Fort Worth v. Crawford*, 64 Tex. 202; S. C., 53 Am. Rep. 753.

THE PRINCIPAL CASE IS CITED IN *Werth v. City of Springfield*, 22 Mo. App. 17, to the point that in an action for damages against a city for a change of grade, whether the plaintiff seeks to hold the city liable at common law or under the constitution, it is incumbent upon him to show that the act complained of was the act of the city, and not that of its unauthorized officers, for which they alone are responsible, and not the city. And see S. C. before, 78 Mo. 107. It is also cited in *Fink v. Missouri Furnace Co.*, 82 Id. 283, as recognizing and affirming the principle "that one who has contracted with a competent and fit person exercising an independent employment to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractor, or his servants, committed in the prosecution of such work. An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The contractor must answer for his own wrongs committed in the course of the work by his servants": 2 Thompson on Negligence, 899, sec. 22.

MERCHANTS' ETC. INS. CO. v. CURRAN.

[45 MISSOURI, 142.]

POLICY OF INSURANCE IS NOT VOID because the risk was taken in violation of a by-law providing that certain risks should not be taken unless approved by a special committee, the policy having been issued by the duly authorized agents of the company, and upon a full knowledge of all the facts material to the risk.

GRANTING OF NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE is a matter resting in the sound discretion of the judge trying the cause.

ACTION by insurance company to recover assessments upon the defendant's premium note. The facts appear in the opinion.

Moore and Griffin, for the appellant.

W. H. Horner, for the respondent.

By Court, CURRIER, J. This suit is brought to recover two assessments upon the defendant's premium note, payable to the plaintiffs. The note was given in consideration of a policy of insurance issued to the defendant by the plaintiffs, insuring certain property therein described.

The answer admits the execution and delivery of the note and policy, and also the levying of the assessments, the latter facts not being specifically denied. The defense rests upon the affirmative ground that the note was given without consideration, the policy being the only inducement to it; and that, being, as is alleged, void and of no effect, constituted no consideration for the note. It is alleged that the policy was issued in violation of the company's by-laws, and for that reason it is supposed to be void, and not to bind the plaintiffs.

The plaintiffs' charter authorized the insurance of "property of all kinds," and provided that the "business of the company should be conducted under such rules and regulations as might from time to time be adopted by the directors." One of these rules provided that "steam-mills, and other establishments where fire, heat, and steam" were employed, might be insured, "if approved, at special rates"; another rule provided that these special risks should be approved by an executive committee of three directors, before a policy thereon should be issued. An alleged violation of this rule is supposed to vitiate the policy.

The property insured in the policy was used for distilling purposes, and "fire, heat, and steam power" were employed in operating the establishment, all of which was known to the

plaintiffs at the time the policy was issued, and a special rate was charged accordingly. The policy was signed by the president and secretary, and verified by the company's seal. What agency the executive committee had in issuing it does not distinctly appear. The pleadings made no issue on that specific subject; and the court, at the trial, gave and refused instructions upon the theory that the supposed non-action of this committee was immaterial to the validity of the policy. It is this action of the court that is complained of, and that is urged as the main reason for reversing the judgment.

The point is not well taken. The policy was signed by the president and secretary, as the by-laws required; and the by-laws vested in the president the "general supervision of the affairs of the company." The policy was issued by the duly authorized agents of the company, and upon a full knowledge of all the facts material to the risk. The company cannot successfully deny its liability thereon. The executive committee, as agents of the plaintiff, had no official duty to discharge in the actual execution and delivery of the policy. Their action was preliminary, and in this instance must be held to have been waived. They were but the subordinates of the board of directors, and held their positions under appointment of the board. Their duties were subordinate, and imposed for the convenient transaction of business. The non-action of this committee should be held no defense to a suit on the policy, and can therefore be no defense here. The case at bar is wholly unlike *Plahto v. Merchants' & M. I. Co.*, 38 Mo. 248, and *Mound City Ins. Co. v. Curran*, 42 Id. 374; but *Union M. F. Ins. Co. v. Keyser*, 32 N. H. 313 [64 Am. Dec. 375], is in point as an authority adverse to the defendant. That was a suit on a premium note. The defense was, that the note and policy were void because the risk had been taken in violation of the company's by-laws; but it was held that this fact did not avoid the policy, or the note which was given in consideration of the policy.

The defendant's motion in arrest was properly overruled. It has no tenable ground to stand upon. Nor can we say that the court erred in overruling the defendant's motion for a new trial, so far as that motion was based on an allegation of newly discovered evidence. That was a matter resting in the sound discretion of the judge trying the case; and there is nothing to show that the action of the court in this particular was unwarranted. In fact, the alleged newly discovered evi-

dence had little or no bearing upon the issues made by the pleadings.

Upon the whole, it is my opinion that the judgment should be affirmed.

The other judges concurred.

INSURANCE COMPANY IS BOUND BY ACTS OF ITS GENERAL AGENT, within the scope of his authority, although he violates limitations upon that authority not brought home to the knowledge of the party with whom he deals: *Viele v. Germania Ins. Co.*, 96 Am. Dec. 83, and note 112, where the cases are fully collected.

WAIVER OF CONDITIONS IN POLICY OF INSURANCE: *Viele v. Germania Ins. Co.*, 96 Am. Dec. 83, and note 111; *Howitt v. Insurance Co.*, 93 Id. 321.

WHEN CONTRACT OF INSURANCE IS COMPLETE: *Pino v. Insurance Co.*, 92 Am. Dec. 529, and note 532.

NEW TRIAL, NOT GRANTED ON GROUND OF NEWLY DISCOVERED EVIDENCE which could not change the result: *Teal v. State*, 68 Am. Dec. 482, and note 486.

DAVENPORT NATIONAL BANK v. HOMEYER.

[45 MISSOURI, 145.]

BILL OF LADING HAS ATTRIBUTE OF NEGOTIABILITY in a qualified and restricted sense, and may be transferred by indorsement and delivery.

DELIVERY OF BILL OF LADING FOR VALUE, THOUGH UNINDORSED, CARRIES WITH IT the property in the goods covered thereby, as against the consignor's factor, though a consignee is named therein; and this is so, although the consignor was indebted to his factor for advances made on account of prior shipments.

BILL OF LADING REPRESENTS PROPERTY THEREIN DESCRIBED, and a delivery of the bill is treated as a symbolical delivery of the property.

THE opinion states the case.

Krum, Decker, and Krum, for the appellants.

E. W. Pattison, for the respondent.

By Court, CURRIER, J. In February, 1867, S. M. and D. A. Burrows of Davenport, Iowa, consigned to the defendants, as their factors or commission merchants, three hundred barrels of flour. The flour was shipped by railroad in two parcels, and the usual bills of lading issued therefor by the carrier. The consignors at the same time drew on the consignees, against the flour, three drafts of nine hundred dollars each. These drafts were discounted by the plaintiffs upon the faith of the bills of lading, which were deposited with them as col-

lateral security. The bills of lading were not indorsed or formally assigned in writing. They were attached to the drafts, and thus transferred to the bank. The consignors were at the time in arrear to the consignees for advances made on account of prior shipments. The advances had been made with an expectation, on the part of the consignees, of a continued business.

Upon this state of facts, the question arises whether, for the purposes of the discount, the mere manual delivery of the bills of lading vested in the plaintiff such title to the flour that they can hold it or its proceeds as against the defendants.

In a qualified and restricted sense, a bill of lading has the attribute of negotiability. Various authorities cited by the defendants' counsel show that this is so, and that such contracts may be transferred by indorsement and delivery. This is undoubtedly the accepted doctrine on that subject. It does not thence follow, however, that a transfer by manual delivery merely would be nugatory or ineffectual as against the consignor's factor to whom the goods described in the bill of lading may have been shipped, as in the present case. But this is the defendants' point. It is plausible, but not sound. Nor is it sustained by the authorities cited in its support. *Law v. Hatcher*, 4 Blackf. 364, goes no further than to affirm the proposition that the title to goods conveyed by a bill of lading would pass from the consignor to a purchaser by an indorsement and delivery of the bill of lading to the vendee. This is but the common doctrine affirmed by all the cases. The question whether a mere manual delivery of the bill, without a written indorsement, would not have had the same effect is a point not noticed in the case. Nor is it raised in the other cases to which the defendants' counsel refers us. *Storm v. Swift*, 4 Pick. 389, was a suit for malicious prosecution. It was there decided that the holder of an unindorsed bill of lading could not sue upon it in his own name. In *Buffington v. Curtis*, 15 Mass. 497, it was held that an indorsement of the bill of lading without a delivery of it did not transfer the title to the goods. In *Allen v. Williams*, 12 Pick. 297, it was held that where the bill of lading was filled up with the name of a particular consignee or bearer, the mere delivery of the bill by the shipper for value passed the property, as against the named consignee. And the court say that whether the transferee acquired, by delivery of the bill of lading, an absolute property in the goods, or a lien only, was immaterial.

But it is urged that, although it be true that the delivery of a bill of lading without indorsement conveys the title to the goods it covers, when by the terms of the bill the goods are deliverable to "bearer," still it would be otherwise when, as in this case, the bill contained no word or provision of equivalent force or meaning. This distinction is not shown to be recognized by any adjudicated case.

The adjudication in *Bank of Rochester v. Jones*, 4 N. Y. 497, sustains fully the proposition that the delivery of a bill of lading for value, although unindorsed, and containing no provision for the delivery of the goods to bearer, carries with it the property in the goods covered by the bill, as against the consignor's factor; and this, although the consignor was indebted to his factor for advances made on account of prior shipments. That case and the case at bar are quite identical in all their material facts and circumstances.

The bill of lading represents the property therein described, and a delivery of the bill is treated as a symbolical delivery of the property. A written indorsement may be necessary to transfer the contract so as to enable the transferee to sue on it in his own name, as in *Buffington v. Curtis*, *supra*; but the delivery of the bill of lading without indorsement, for value, transfers the property in the goods. In *Bank of Rochester v. Jones*, *supra*, the court say: "The true ground on which to sustain this transfer of property is by regarding the transaction as a sale to the bank in trust, to deliver the property to the consignee in case he accepted the drafts; and if he refused to accept, then to sell the flour, and to retain out of the proceeds the amount of the drafts, and to pay the surplus to the consignor."

In the case at bar, the shippers were the owners of the flour, and had absolute control over it. They consigned it to the defendants, and drew upon them against the shipments, delivering over to the plaintiff the bills of lading as collateral to the drafts which the plaintiff discounted. The defendants having refused to accept, they were not at liberty to appropriate the flour or the proceeds of it to their own use. It was the property of the plaintiff for the purpose of meeting the dishonored drafts.

This substantially disposes of the case. It discloses no facts of a character to defeat the rights of the plaintiff, acquired in virtue of their negotiation and arrangement with the shippers of the flour. The evidence shows that the defendants antici-

pated further shipments, but there is no evidence of any concluded arrangement between them and the Burrowses to that effect, or that the defendants ever made any advances on the flour in question. Nor are the defendants helped in their resistance of the plaintiff's claim by the circumstance that one of the Burrowses was a *feme covert*.

In my opinion, the judgment ought to be affirmed.

The other judges concurred.

BILL OF LADING, NATURE OF, IN GENERAL: See *Steele v. Townsend*, 79 Am. Dec. 49; *McMillan v. Railroad Co.*, 93 Id. 208; fairly indorsed, passes title to indorsee: *Decan v. Shipper*, 78 Id. 334; how far may be controlled by parol evidence: *Norris v. Milwaukee Dock Co.*, 91 Id. 484, and note 468.

THE PRINCIPAL CASE IS CITED to the point that the delivery of a bill of lading without indorsement, for value, transfers the property in the goods, in *Skilling v. Bollman*, 6 Mo. App. 84.

GIBSON v. CHOUTEAU.

[45 MISSOURI, 171.]

COURT MAY ALWAYS, EVEN AT SUBSEQUENT TERM, and after the case has been finally disposed of, set right mere forms in its judgments, or correct misprisions of its clerks, or any mere clerical errors, so as to conform the record to the truth.

WHERE COURT HAS OMITTED TO MAKE ORDER, WHICH IT MIGHT OR OUGHT TO HAVE MADE, it cannot at a subsequent term be made *nunc pro tunc*. In all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry.

MOTION for correction of judgments. The opinion states the case.

Charles Gibson, for the motion.

Glover and Shepley, contra.

By Court, WAGNER, J. Motion by plaintiff, praying for the correction of two former judgments rendered in this cause, respectively at October term, 1866, and at the March term, 1867. At the first argument of the cause in this court at the October term, 1866, final judgment was given for plaintiff. The counsel for defendants then moved for a rehearing on one single point only; namely, the statute of limitations.

After consideration, the motion was sustained, and a rehearing granted as to that point, and the case was set for reargument at the next ensuing term. At the hearing in the

March term, 1867, the prior rulings of this court were not disturbed, indeed they were not open for consideration, excepting on the single question of the statute of limitations, and the judgment was reversed on that question, and that only. In making up the records, the clerk omitted to state any special ground for which the rehearing was granted, but made a general entry, stating that the "judgment heretofore entered in this cause be and the same is hereby set aside, and this cause is docketed for a new hearing." In like manner, in entering the last and final judgment, at the March term, 1867, the record disclosed a general judgment of reversal which included and covered the whole ground of controversy.

Plaintiff prosecuted his writ of error from the decision of this court to the supreme court of the United States, and in that court the writ was dismissed for the reason that it did not appear that the judgment of this court was based exclusively on the question of the statute of limitations, and that it might have been founded on other issues not reviewable in the supreme court of the United States.

The question now is, whether this court will correct the judgments and enter them *nunc pro tunc*, so as to impart validity to them as of the term when they should have been so rendered.

The main ground taken in resisting the motion is, that the terms having passed, at which the judgments were rendered, the motion cannot be granted; that judgments *nunc pro tunc* can only be rendered during the progress of the cause, and not after the case has been finally disposed of, and the term has elapsed. There is no dispute or contention about the facts in the case, the records of this court show them to be as above stated. The first judgment of this court was undisturbed, except as to one point,—the statute of limitations,—and the final judgment was an express affirmance of that ruling in all things, the reversal being predicated solely on that statute.

The plaintiff was entitled to have the actual facts appear on the record, and their failure to so appear was a clerical error or mistake of the clerk. Where the clerk fails to enter judgment, or enters up the wrong judgment, there is no doubt about the existence of power in the court to correct the matter, and order the proper entries to be made at any time. The court may always, at subsequent terms, set right mere forms in its judgments, or correct misprisions of its clerks, or any

mere clerical errors, so as to conform the record to the truth: *Hanly v. Dewes*, 1 Mo. 16; *Sibbald v. United States*, 12 Pet. 492; *Medford v. Dorsey*, 2 Wash. 433; *Bank v. Wistar*, 3 Pet. 431; *Weston's Case*, 11 Mass. 417; *Jackson v. Weisiger*, 1 Bibb, 324; *Keams v. Rankin*, 2 Id. 88; *Lawrence v. Cornell*, 4 Johns. Ch. 542; *The Palmyra*, 12 Wheat. 10; *Hammer v. McConnell*, 2 Ohio, 32; Com. Dig., tit. Amendments, T, 1.

In *Hyde v. Curling*, 10 Mo. 359, it was held that a court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc*. But where the court has omitted to make an order, which it might or ought to have made, it cannot, at a subsequent term, be made *nunc pro tunc*. In all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry.

In the case of *State v. Clark*, 18 Mo. 432, *Hyde v. Curling*, *supra*, was approved, and it was declared there was no doubt of the power of the court to make *nunc pro tunc* entries on the record in furtherance of justice.

The record here shows all the facts authorizing the amended entry, and justice demands that the order be made. The record should be made to conform to the truth, and the plaintiff should not be deprived of the privilege of prosecuting his suit on account of a mere mistake in entering judgment.

The motion will be sustained, and a judgment *nunc pro tunc* entered.

The other judges concurred.

JUDGMENT, AMENDMENT OF, *NUNC PRO TUNC*: *Sims v. Boynton*, 70 Am. Dec. 540; *Gunn v. Howell*, 73 Id. 484.

CONCLUSIVENESS OF JUDGMENTS: See *Pureley v. Hayes*, 92 Am. Dec. 350, and extended note 373.

AMENDMENT OF JUDGMENT UPON MOTION, and notice to the adverse party: See *Hill v. Hoover*, 68 Am. Dec. 70, and note; *Howard v. Richards*, 90 Id. 520.

THE PRINCIPAL CASE IS CITED, and the rules stated in the *syllabus* approved, in *Turner v. Christy*, 50 Mo. 147; *Saxton v. Smith*, 50 Id. 491; *Priest v. McMaster*, 52 Id. 62; *Jillett v. Union Nat. Bank*, 56 Id. 306; *State v. Primm*, 61 Id. 170; *Woodbridge v. Quinn*, 70 Id. 371; *Belkin v. Rhodes*, 76 Id. 652.

PACIFIC RAILROAD COMPANY v. SEELY.

[45 MISSOURI, 212.]

AGREEMENT TO GIVE RAILROAD COMPANY INTEREST IN CERTAIN LAND or town lots, provided it would locate its station at a certain specified place, is void as against public policy.

RAILWAY STOCK SUBSCRIPTIONS, CONDITIONAL ON LOCATION OF LINE or station, are upheld, on the ground that this agreement, and not the stock itself, is conditional.

RAILROAD COMPANY HAS NO AUTHORITY TO ACQUIRE LAND FOR PURPOSES OF SPECULATION under a grant of power to acquire and hold sufficient real estate for the construction of its road, and for the erection of depots, engine-houses, etc.

SUIT for specific performance. The opinion states the case.

Whittlesey, for the plaintiff in error.

Draffin and Muir, for the defendants in error.

By Court, WAGNER, J. This was a suit instituted in the circuit court of Moniteau County, praying for a specific performance. It appears from the record that one William T. Seely, in his lifetime, and on the twenty-first day of December, 1857, made and executed a contract in writing with plaintiff, which contained an obligation that, in consideration that plaintiff would locate a freight and passenger station on the land of said Seely, he would, in addition to the land already given, convey to the railroad, whenever called upon, four acres of land, for freight and passenger stations.

He further agreed, by said contract, to lay off into town lots 160 acres, in such manner as the engineer of the plaintiff might direct, and make a deed to an undivided fourth part thereof to such persons as the directors of the plaintiff should designate. Seely made a plat of the town, showing the streets and alleys and railroad grounds, and placed the same on the records of the county. Afterward, in the year 1863, Seely died, and the plaintiff, in 1868, commenced this suit against his heirs and administrators. The petition averred that plaintiff had fully complied on its part with all the acts which constituted the consideration.

To this petition the defendant interposed a demurrer, and assigned the following grounds of objection: 1. Because the petition does not state facts sufficient in law to constitute a cause of action, in this: the corporation or plaintiff, in the construction of the road and in the location of its depots and passenger-stations, acted in the capacity of commissioners,

representing, in part, the community or public, and could not, by contract, bind itself to locate a depot at any particular place. Such an agreement is against public policy and *nudum pactum*, and cannot be enforced. 2. Because the plaintiff had no power under its charter to make the contract sued on; it would have no right to engage in town speculations in the purchase of lands, and holding them for villages and towns, either to rent or sell. The contract is therefore void. The third ground taken by the demurrer was, that the petition was multifarious; and the fourth objection was, that the written contract was not filed with the petition. The demurrer was sustained in the circuit court, and no answer being filed, judgment absolute was rendered in favor of the defendants. This judgment was affirmed in the district court, and the case is here for revision on error.

The first two assignments set forth in the demurrer constitute the essential merits of the case, and will be alone considered. There are certain contracts which corporations cannot make, which it would be perfectly competent for individuals to execute. The charter of corporations constitutes the chart of their authority, and they have no powers except such as are expressly granted, and such as are auxiliary or necessary to carry out and subserve the object of their creation.

The act incorporating the Pacific railroad defines its powers, and specifies the objects for which it was created. The seventh section of the act incorporating the company provides that said company shall have full power to survey, mark, locate, and construct a railroad from the city of St. Louis to the city of Jefferson, and thence to some point in the western line of Van Buren County (afterwards changed to Cass County), in this state, with a view that the same may be hereafter continued westwardly to the Pacific Ocean; and for that purpose may hold a strip of land not exceeding one hundred feet wide, and may also hold sufficient land for the construction of depots, warehouses, and water-stations; and may select such route as may be deemed most advantageous, and may extend branch railroads to any point in any of the counties in which said road may be located: Sess. Acts 1849, p. 220, sec. 7.

In 1851, section 7, *supra*, was amended so as to give the company authority to locate and construct the road on any route which it might deem most advantageous, to any point on the western line of this state which it might select; and the power was also conferred to hold a strip of land not exceeding

one hundred feet wide, except where it was necessary for turn-outs, embankments, or excavations; in which case it was authorized to hold a sufficient width for the preservation of the road; and it was further empowered to hold sufficient land for the erection and maintenance of depots, landing-places, or wharves, engine-houses, offices, machine-shops, warehouses, and wood and water stations: Sess. Acts 1851, p. 272, sec. 10. Section 20 of the original charter declares that the operations of the company shall be confined to the general business of locating, constructing, managing, and using said railroad, and the acts proper to carry the same into complete and successful operation.

The above sections designate the general objects of the road, and comprise its whole power in relation to obtaining and holding real estate. In regard to the first question presented by the record, there have been differences of opinion in the courts, and the authorities are admittedly diverse. The case of *Taylor v. Cedar Rapids etc. R. R. Co.*, 25 Iowa, 371, so strongly relied upon by the counsel for the plaintiff in error to show that a contract for the location of a depot or station-house at a particular place is valid, is hardly an authority for the position he assumes. There the grantor had conveyed the right of way to a railroad company, upon the condition that the depot of the company should be located within a certain distance of a particular place. The grantor did not surrender the land, and the railroad failed to comply with the stipulations, and located the depot at another and different place. The court held that a breach of the condition defeated the estate conveyed by deed, and that the vendor, not having surrendered the possession of the land, might enforce the forfeiture, and have his damages for the right of way assessed as though no deed had ever been made. No question was raised as to whether the deed was valid or invalid on the grounds of public policy. The grantor was the only person who could have raised that question, and he did not seek to avail himself of it. He had willingly parted with his estate upon an agreed condition, and when the other party violated the condition, the court said that he was entitled to damages for his right of way.

Many cases have been cited to show that subscriptions of stock to railway companies, conditional on the location of the line or station, would be upheld. Although this is denied by the courts in New York, yet it is the general doctrine: *Racine*

County Bank v. Ayers, 12 Wis. 512; *McMillen v. Maysville etc. R. R. Co.*, 15 B. Mon. 218 [61 Am. Dec. 181]; *Henderson v. Leavell*, 16 Id. 358; *Carlisle v. Terre Haute etc. R. R. Co.*, 6 Ind. 316; *Fisher v. Evansville etc. R. R. Co.*, 7 Id. 407; *Cumberland R. R. Co. v. Baab*, 9 Watts, 458 [36 Am. Dec. 132]; *Rhey v. Ebensburg Plank Road Co.*, 27 Pa. St. 261; *Central Turnpike Corp. v. Valentine*, 18 Pick. 142; *Troy etc. v. Newton*, 1 Gray, 544; *Chapman v. Mad River etc. R. R. Co.*, 6 Ohio St. 119. Such subscriptions are upheld on the ground that the agreement, and not the stock itself, is conditional. The parties subscribing are not considered stockholders until the company has performed the condition on which the undertaking depends; and when that is done, they become stockholders by force of the agreement of the parties, and the subscription becomes absolute. Of this character are the subscriptions made by counties and townships as well as individuals, providing that the road shall be located upon a prescribed line. But the conveyance proposed and sought to be enforced in this case was not in the nature of a stock subscription. Stock is subscribed and used by the company for the purposes of construction and equipment, and carrying out its legitimate pursuits. The subscribers become share-holders, and are entitled to a voice in the management of the company. But Seely did not offer to subscribe or become a share-holder. He proposed to deed the company a lot of land for speculative purposes, in consideration that it would do a certain thing. There is no evidence that the land was to be used for the general business of locating, constructing, managing, and using the road. But the broad position is taken that the company is a private corporation, and has the right to buy and hold all kinds of property the same as an individual. This position is wholly indefensible. Whilst it is true, in one sense, that it is a private corporation, yet the public is deeply interested in it. Its chartered privileges and franchises were not granted solely and exclusively for private benefit and emolument, but to subserve a great public interest.

In *Walther v. Warner*, 25 Mo. 277, this court decided that the building of a railroad by a private corporation, under the authority of the legislature, for the public accommodation, was a public use for which private property might be lawfully taken. In all these enterprises, there is a mingling of both public and private benefit, and the interests of the public are not to be sacrificed to mere private gain.

In the case of *Fuller v. Dame*, 18 Pick. 472, the action was on an agreement made in consideration of certain services in procuring the location of a depot at a certain place. It was a contract entered into between D. and F., and recited that D. was the owner of land, which would be enhanced in value if the Boston and Worcester Railroad Corporation should establish their depot on certain flats; and that, in order to procure the corporation to make such location of the depot, it would be necessary to form a joint-stock company to purchase the flats and give a portion thereof to the railroad corporation for the depot, and that F. had agreed to aid in getting up such a company, and in causing the railroad company to fix its depot on the flats, it being understood that he was of the opinion that the railroad corporation, with a view to the public good and the interests of the stockholders, ought to have its depot there; and D. agreed to make F. a pecuniary compensation so soon as the depot should be located on the place specified. A company was accordingly formed and incorporated, with power to purchase and hold the flats, and to give a portion thereof to the railroad corporation as an inducement to establish the depot thereon, and an agreement was made between the two corporations by which the depot was located on the flats. F. was a member of the railroad corporation at the time when he made the agreement with D., and subsequently became a member of the joint-stock company.

Although the court had previously sustained conditional subscriptions to stock, as heretofore noted, yet they held that this agreement was contrary to public policy, and to open, upright, and fair dealing, because it tended injuriously to affect the public interest in having the fittest location of the depot and the interests of the two corporations, and consequently it was invalid.

Shaw, C. J., speaking for the whole court, gave the subject the following lucid exposition: "The case in question is, we think, clearly within the operation of this salutary principle. Without considering other aspects of the contract, we are of opinion that it was contrary to public policy and to upright and fair dealing, as it tended injuriously to affect the public interest in establishing the fittest and most suitable location for the termination of the Worcester railroad, for the accommodation of public travel; 2. As it affects the interests of the proprietors of the Worcester railroad; 3. As it affected the interests of the joint-stock company incorporated under the name

of the South Cove Corporation. The Boston and Worcester railroad was established for the public accommodation and convenience in the transportation of passengers and merchandise. Like a country road, it was in many respects a common highway. It has been so held in case of turnpike roads: *Commonwealth v. Wilkinson*, 16 Pick. 175 [26 Am. Dec. 654]. It may be said that it was to be constructed and located by the corporation. True, as in the case of a turnpike road, it is constructed in the first instance at the expense of a private company of adventurers, under the sanction of the legislature, incorporated for that express purpose, and they are to be reimbursed by a toll levied and regulated by law for their remuneration. The work is not the less a public work, and the public accommodation is the ultimate object. It is also true that it was left to the corporation and directors to fix the termination and place of deposit. In doing this, a confidence was reposed in them, acting as agents for the public,—a confidence which it seems could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried and had goods to be carried, that is, with the public interest. This confidence, however, could only be safely so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness, without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public, or the interests of the company. Any attempt, therefore, to create and bring into efficient operation such undue influence has all the injurious effects of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to public interests to be affected and controlled by considerations having no regard to such interests."

The agreement in this case was to give the company an interest in town lots, provided it would locate its station at a certain specified place. It is easy to perceive how such a transaction might be perverted so as to operate most injuriously to the public. Speculators and landed proprietors, for the purpose of enhancing their property, would always be on hand to obtain locations, and forcing people to their premises, regardless of the consideration whether they were the most fit and convenient; and the companies, tempted by the prospect of gain, would accede to these propositions, and thus the general

welfare and good of the public would be sacrificed to subserve mere private interests. Whilst conditional subscriptions to stock may be entirely valid, I do not think agreements of this character should be upheld.

The next question is, whether it was competent for the railroad company to hold these lots under its charter. "A corporation," says Chief Justice Marshall, "being the mere creature of law, possesses only those properties which the charter of its corporation confers upon it, either expressly or as incidental to its very existence": *Dartmouth College v. Woodward*, 4 Wheat. 518.

The same doctrine is reiterated by McLean, J., in *Beatty v. Knowler*, 4 Pet. 152, and is, in effect, laid down by all the elementary writers, and contained in all the American cases upon the subject: *Blair v. Perpetual Ins. Co.*, 10 Mo. 559 [47 Am. Dec. 129]; *Merchants' Bank v. Harrison*, 39 Id. 433 [93 Am. Dec. 285]; *Hoagland v. Hannibal etc. R. R. Co.*, 39 Id. 451; *City of St. Joseph v. Saville*, 39 Id. 460; *Chautauque County Bank v. Risley*, 4 Denio, 485; *State v. Mansfield*, 23 N. J. L. 510; *State v. Newark*, 25 Id. 315. The corporation, then, can purchase and hold land only for such purposes as are authorized by its charter.

The act of incorporation gave the plaintiff power to acquire a strip of land, not exceeding one hundred feet wide, for a right of way, and to hold sufficient ground for the erection and maintenance of depots, landing-places, or wharves, engine-houses, offices, machine-shops, and wood and water stations; but it conferred upon it no authority to become a real estate broker or speculator in town lots. I think the contract, so far as it proposed to invest the company with the title to the lots, was utterly void.

Something has been said concerning the lot of land on which the depot and station are situated, but that requires no particular discussion. On the plat it was dedicated for that specific purpose; the company has been in quiet and peaceable possession for nearly ten years, and so far there has been no effort to molest its possession. When an attempt is made to interrupt the enjoyment, it will then be time enough to consider the matter.

In my opinion, the judgment should be affirmed.

Affirmed.

SUBSCRIPTION TO RAILROAD STOCK ON CONDITION THAT CERTAIN ROUTE
BE TAKEN must be paid if condition is complied with: *Railroad Co. v. De*

Grafenreid, 78 Am. Dec. 476; when stock subscriptions cannot be collected, see *Aspinwall v. Ohio etc. R. R. Co.*, 83 Id. 329.

RAILROAD COMPANY MAY PURCHASE AND SELL LAND, when object of incorporation is thereby furthered: *Old Colony R. R. Co. v. Evans*, 66 Am. Dec. 394.

THE PRINCIPAL CASE IS CITED to the point that the question of *ultra vires* can only be raised in a direct proceeding by the state against the corporation, and not in a collateral proceeding by another, except when the charter of the corporation not only specifies and therefore limits it to the business in which it may engage, but, by express terms, or a fair implication therefrom, invalidates transactions outside of its legitimate corporate business, in *St. Louis Drug Co. v. Robinson*, 81 Mo. 26; *St. Louis Stoneware Co. v. Partridge*, 8 Mo. App. 221; it is cited to the point that where a railroad company has granted to it, by its charter, a franchise intended, in a large measure, to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing these functions is void and against public policy, in *Chouteau v. Union R'y Co.*, 22 Id. 299; *City of St. Louis v. Gas Light Co.*, 5 Id. 530; and is distinguished in *Missouri Pacific R'y Co. v. Tygard*, 84 Mo. 269, holding that a subscription to a railroad as a donation to induce it to locate the road at a particular place is not void, as being against public policy.

KIRBY v. BRUNS.

[45 MISSOURI, 234.]

VALUE OF IMPROVEMENTS PLACED BY HUSBAND ON LAND OF WIFE WILL BE APPLIED by appropriate equity proceedings, to the payment of claims existing against him at the date of the investment. On a proper case made, equity will decree a sale, and a division of the proceeds according to the rights of the respective parties.

ON HEARING BEFORE JURY OF CASE COMBINING LEGAL AND EQUITABLE PROCEEDINGS, if the plaintiff voluntarily takes a nonsuit, without a submission of the equity branch to the court at all, the supreme court will not relieve him.

THE opinion states the case.

White, and Ewing and Smith, for the plaintiffs in error.

Lay and Belch, for the defendants in error.

By Court, CURRIER, J. The petition in this cause contains two counts, — one in ejectment, and one in equity. No issues were framed under the equity count for submission to a jury, but a jury trial was had, as in an ordinary action at law. The plaintiffs insist, nevertheless, that the trial was in fact upon the equity count alone; and on that they now seek to stand, rejecting as superfluous the law branch of the case. The suit involves the title to certain premises in Jefferson

City. The equity count charges that the original lot, without improvements thereon, was acquired with the funds and means of the defendant Herman L. Bruns; and that the title thereto was vested in his wife, Mrs. Maria C. Bruns, the other defendant, in fraud of the right of said Herman L. Bruns's creditors, he at the time being in an insolvent condition. It is further charged that Bruns, after the purchase, in like fraud of his creditors, among whom were the plaintiffs, made valuable improvements upon said lot. Bruns's interest in the premises, as the petition avers, was levied upon and bought in by the plaintiffs at execution sale.

The evidence preserved in the bill of exceptions does not, in my opinion, sustain the allegation that the original lot was acquired with the funds and means of the defendant Herman L. Bruns. But it very clearly shows that the dwelling-house and other improvements subsequently placed thereon, at a cost of some two thousand five hundred dollars, or three thousand dollars, were placed there by him, and at his cost and expense. We entertain no doubt that the value of these improvements may be reached through appropriate chancery proceedings by his creditors, and the amount thereof applied to the payment of claims against Bruns existing at the date of such investment: See *Pharis v. Leachman*, 20 Ala. 662; *Love v. Graham*, 25 Id. 178.

The circumstance that the defendants have so mingled their separate interests in the property that those interests cannot now be successfully apportioned in the way of a partition of the estate cannot be allowed to defeat the just rights of Bruns's creditors. On a proper case made, chancery will decree a sale of the property, and a division of the proceeds, according to the rights of the respective parties: See cases cited above.

But the case has been greatly confused by an attempt to combine legal and equitable proceedings in the same action. As a chancery proceeding, no issues having been framed for submission to a jury, the trial should have been by the court, and a decision had upon the equitable merits of the cause. But the hearing was before a jury, and because the jury were supposed to have been improperly instructed as to the law of the case, the plaintiffs took a nonsuit, without a submission of the equity branch of the case to the court at all. They still adhere to their abandonment of the ejectment branch of the suit, treating it as mere surplusage, and seek a restoration of their standing in court that they may try the equity branch

of the case. This practice is not allowable. The nonsuit as to the equity side of the litigation was purely voluntary, and the case must be disposed of as in other instances of voluntary nonsuit: *Schulter v. Bockwinkle*, 19 Mo. 647; *Dumey v. Schoefler*, 20 Id. 323; *McMurtry v. Glascock*, 20 Id. 432; *Sone v. Palmer*, 28 Id. 539; *Gentry v. Black*, 32 Id. 542; *Layton v. Riney*, 33 Id. 87; *Corby v. Taylor*, 20 Id. 374.

The judgment will be affirmed.

The other judges concurred.

WHERE HUSBAND FURNISHES PORTION OF LABOR, CAPITAL, OR CREDIT used in carrying on a business, the wife will be entitled, even as against his creditors, to such portion of the profits as will compensate her for what she may have contributed to the business, either in the shape of capital or credit, provided an apportionment of the profits can be made according to the respective contributions of the parties. And a court of equity will make such apportionment to the extent to which it can be made: *Penn v. Whitehead*, 94 Am. Dec. 478.

RIGHT OF MARRIED WOMAN TO PRODUCTS AND AVAILS OF HER SEPARATE PROPERTY, as against her husband's creditors: See *Rush v. Vought*, 93 Am. Dec. 769, and cases collected in note 774. Compare *Kuhn v. Stansfield*, 92 Id. 681; *Glidden v. Taylor*, 91 Id. 98, and note 103.

THE PRINCIPAL CASE IS CITED to the point that appeal will not lie to set aside a voluntary nonsuit, in *Koger v. Hays*, 57 Mo. 330.

McCLURG v. HOWARD.

[45 MISSOURI, 265.]

PART PAYMENT OF JOINT DEBT BY ONE of the joint debtors, before the debt is barred by the statute of limitations, will take the debt out of the operation of the statute as to the other joint debtor.

ACTION for goods sold. The opinion states the case.

Sherwood, and Johnson and Budd, for the appellants.

Baker and Ellis, for the respondent.

By Court, BLISS, J. The plaintiffs brought suit in the Christian circuit court against the members of the firm of Nowlin, Howard, & Co., for goods and merchandise sold them in the usual course of trade, which suit Howard alone defended, and pleaded the statute of limitations. He claims that he went out of the firm in 1857 (of which plaintiffs had notice), which was more than five years before the commencement of the suit. The plaintiffs, to take the case out of the statute, relied upon the fact that the sums of five hundred

dollars and thirty dollars were, in 1861, paid upon the debt by this defendant's copartners; but the circuit and district courts held that it did not have that effect, and judgment for defendant was rendered and affirmed.

Few questions have been more zealously contested in the common-law courts than the one involved in this record. The case of *Whitcomb v. Whiting*, 2 Doug. 652, decided by Lord Mansfield in 1781, was for many years treated as establishing the doctrine that one of the makers of a promissory note, by the payment of the interest and part of the principal within six years (the limitation fixed by 21 Jac. I., c. 16), took the case out of the statute as to the other makers as well. This case was for a time generally followed by the courts of the United States, and is still considered the law of England, and has been applied to all partnership debts, as well as to joint makers of a bill or note; and no distinction seems to have been made between a part payment before the statute had run and one made after the expiration of the time limited. The whole subject is learnedly discussed in the notes to the fifth edition of Angell on Limitations, pages 273-279; also in a note to section 324, Story on Partnership.

The general effect of a new promise or acknowledgment, which had been the subject of such conflict of opinion, has been set at rest in Missouri by the adoption of the substance of the statute of 9 Edw. IV., c. 14, so far as it pertains to this subject, which is embodied in sections 28, 29, and 30, pages 920 and 921, of Wagner's Statutes, by which all such new promises and acknowledgments must be in writing. But the express exception made by section 30, that the statute shall not take away or lessen the effect of a part payment, leaves cases like the one at bar precisely as though it had not been adopted. The effect of such payments has been very elaborately considered in the court of appeals of New York, in *Van Keuren v. Parmelee*, 2 N. Y. 523 [51 Am. Dec. 322], and in *Shoemaker v. Benedict*, 11 Id. 176 [62 Am. Dec. 95]. In the former case, the part payment was made after the statute had run and the defendant had been discharged by its operation. The decision could only have been that, under such circumstances, a co-obligor had no power, as against the others, to revive an obligation already discharged; although the reasoning of Judge Bronson, in delivering the opinion, goes much further, and would apply as well to a case like the present as to the one before him. But in *Shoemaker v. Benedict*, the

court expressly held that a part payment by a joint obligor, made before the statute had run, had no effect to prevent its running against his co-obligors. I confess it would be very difficult to reply to or resist the force of the reasoning of Judge Allen, who gave the opinion of a majority of the court in that case; and were the question a new one in Missouri, I would favor the application of its doctrine to the present case. But the question was expressly decided the other way by this court in *Craig v. Callaway*, 12 Mo. 94, and the decision was in accordance with the authorities at that time. The business and credits of our people have ever since been conformed to that view, and if a change is deemed expedient, it should be made by the legislature in reference to future indebtedness. We are referred by counsel to *Smith v. Irwin*, 37 Id. 169 [90 Am. Dec. 375], but that case is entirely consistent with *Craig v. Callaway*, *supra*, and only holds that an administrator cannot, after the statute has run, bind the co-obligor of his intestate; and the court would doubtless have held, had it been necessary, that the intestate, if living, would not have had that power.

Regarding this question as not an open one in Missouri, we must hold that the circuit court erred in deciding that the payment of part of the debt by one partner could not extend the operation of the statute as to the others. The record in this case sent up from the circuit court is very badly got up, and more than twice as long as was necessary or proper. It is full of repetitions,—copying papers two or three times, for no apparent reason than to make costs. This practice should not be permitted.

The judgment is reversed, and the cause remanded for further proceedings, with directions to the circuit court to tax one third of the cost of transcript of the original record to the circuit clerk, and one third to the plaintiffs, whose attorneys should have prepared a better bill of exceptions.

The other judges concurred.

EFFECT OF PAYMENT OR PART PAYMENT BY ONE JOINT DEBTOR by note, or otherwise: *Winslow v. Brown*, 80 Am. Dec. 638, and cases collected in note 640.

THE PRINCIPAL CASE IS CITED to the point stated in the *syllabus*, in *County of Vernon v. Stewart*, 64 Mo. 411; *Leach v. Asher*, 20 Mo. App. 600; but it is nevertheless held, in the latter case, that part payment by a trustee from the proceeds of a trustee's sale, of part of a debt secured by the deed of trust, cannot have the effect of arresting the running of the statute in favor of the debtor on the residue of the debt.

PRATT v. MORROW.

[45 MISSOURI, 404.]

EXECUTORY CONTRACT IN WRITING NOT UNDER SEAL MAY, before breach, be varied by parol, either by enlarging the time, changing the mode of payment, or by putting an end to it altogether. But the new contract, if executory, must be founded upon a new consideration.

AS GENERAL RULE, SEALED INSTRUMENT CANNOT BE VARIED or ahrogated by another agreement, unless the latter is also sealed.

VERBAL AGREEMENT TO RESCIND CONTRACT UNDER SEAL FOR SALE OF LAND, made after payments are due, and founded upon no new consideration, unless followed by an actual abandonment of the sale by both parties, and a restoration of the property, so far as possible, to the vendor, will be treated as invalid in a suit by the vendor for the stipulated purchase-money.

SUIT to recover purchase-money due upon contract for sale of land. The facts appear in the opinion.

Burgess, for the appellant.

Mullins and Easley, for the respondent.

By Court, BLISS, J. The plaintiff brought suit in the Linn circuit court to recover the purchase-money due upon a sealed contract for the sale of land, and the defendant set up a parol rescission of the contract and want of title in the plaintiff. Before trial, the plaintiff moved to strike out that part of the answer averring want of title, excepted to the overruling of his motion, and claims the benefit of the error. But the record shows that no evidence was offered and no instructions given upon that branch of the case; hence the plaintiff could have suffered no damage from the action of the court in regard to his motion, even if it were erroneous.

The contract was made in November, 1860; and the land lay next to other land occupied by defendant. It does not clearly appear whether the defendant took actual possession under the contract, the testimony of the parties being contradictory upon that point; but it does appear that in the latter part of 1862 the defendant left the country, and in 1867 returned and took possession of the property, — claiming, however, that he took it under another person, — and holds it adversely to the plaintiff. As to the alleged rescinding of the sale, the defendant is the only witness; and he testifies that in the fall of 1861, in a conversation with the plaintiff, the latter agreed to give up the contract, and in about a year after, upon plaintiff's return from the army, he again told him he was released. The plaintiff contradicts this state-

ment; but inasmuch as the issue of fact has been passed upon by a jury, we will not weigh the evidence, but only consider the questions of law involved. Some of the payments were due at the time of the alleged release, and upon the trial the plaintiff objected to the defendant's testimony concerning the parol discharge, and also asked instructions sustaining his view of the matter, and objected to the instructions given for the defendant sustaining an opposite view. The defendant obtained judgment, which was sustained by the district court.

The record fairly presents the question, whether a verbal agreement to rescind a contract under seal for the sale of land, made after payments are due, which agreement is founded upon no new consideration, and is not followed by any action of either party in relation to the land or the writing, will be treated as valid in a suit by the vendor for the stipulated purchase-money. The authorities are very numerous that bear, or seem to bear, upon this question, though in their application confusion may arise from want of proper distinction between simple contracts in writing and those under seal, between obligations actually due and those not matured, and between simple agreements merely to vary or rescind, and the acts of the parties in carrying those agreements into effect.

It is well settled that an executory contract in writing, not under seal, may, before breach, be varied by parol, either by enlarging the time, changing the mode of payment, or by putting an end to it altogether: *Goss v. Lord Nugent*, 5 Barn. & Adol. 65; *Cuff v. Penn*, 1 Maule & S. 26; *Keating v. Price*, 1 Johns. Ch. 22; *Erwin v. Saunders*, 1 Cow. 250; *Low v. Treadwell*, 12 Me. 441; *Cummings v. Arnold*, 3 Met. 486; Cowen and Hill's notes to 2 Phill. Ev., 5th Am. ed., 694. But the new contract, if executory, must be founded upon a new consideration: *Thurston v. Ludwig*, 6 Ohio St. 1. It is also still the received doctrine that a sealed instrument cannot be varied or abrogated by another agreement, unless the latter is also sealed. *Unumquodque dissolvitur eodem ligamine quo ligatur*: Broome's Legal Maxims, 6th Am. ed., 844, 845, and cases cited; *Harris v. Goodwin*, 2 Man. & G. 505; S. C., 40 Eng. Com. L. 664; *West v. Blakeway*, 2 Man. & G. 729; S. C., 40 Id. 828; *Sellers v. Brickford*, 8 Taunt. 31; S. C., 4 Eng. Com. L. 27; *Thompson v. Brown*, 7 Taunt. 556; S. C., 2 Eng. Com. L. 535; *Woodruff v. Dobbins*, 7 Blackf. 582. But this rule is subject to many modifications and apparent exceptions. If the

contract varying the terms of or abrogating the specialty has been performed, so that the obligor has received the full benefit of the change, or if the obligor has occasioned the breach, or has put it out of his power or that of the obligee to perform, he will not be permitted to avail himself of the default of the other party. A defense founded upon such variation is sustained by the highest equity, was in general available under a plea in bar as well as in chancery proceedings, and clearly can be made under the code: *Dickinson v. Cone*, 6 Ind. 128; *Fleming v. Gilbert*, 3 Johns. 528; *Lattimore v. Harsen*, 14 Id. 330; *Dearborn v. Cross*, 7 Wend. 48; *Ballou v. Walker*, 3 Johns. Ch. 60.

Plaintiff urged that the contract relied upon by the defendant was invalid because it was unsealed, was without new consideration, and was made after breach and an actual indebtedness had accrued. It is certain that an unexecuted parol agreement to rescind, if a nude pact, cannot be enforced; but if executed, courts will not inquire into the consideration nor disturb the condition in which parties have voluntarily placed themselves. It is also true that a present indebtedness can in general only be discharged by payment, accord, and satisfaction, or release under seal; yet when a contract of sale is actually rescinded, the restoration and acceptance of the property should be held to satisfy the obligation for the purchase-money. If the vendor agrees to take back what he has sold, and cancel the debt, it is an accord; and if he actually takes it back, it is a satisfaction. But there is a broad distinction in this regard between an executed and executory agreement. While an executory parol agreement, without new consideration, cannot be enforced, yet if the agreement be executed, the act is a bar. Thus, while a mere verbal promise after breach to cancel a contract of sale would be no defense to an action upon it, yet if the contract be actually canceled, and the property surrendered, it is at an end, and the formality of a sealed release is wholly unnecessary. The effect of such executed agreement is the same whether the contract be sealed or otherwise. The obligation, though it has become a subsisting debt, is discharged by the acts rather than agreement of the parties. It is not always essential that the instrument be surrendered to be canceled, though if done, it is the strongest evidence of the fact of rescission. Reasons may exist why it is not done at the time, yet if the contract remains in possession of the parties as before, with no reason why it is

not delivered up or canceled upon its face, and especially if no change of possession takes place in regard to the property, it is a circumstance that would weigh strongly with the jury against the claim of rescission in fact.

The effect of an unexecuted parol agreement to rescind a sealed contract for the sale of land, founded upon a new consideration, has been often discussed, and the decisions do not seem to be quite uniform. The tendency, however, is to validate such agreements, and thus so far to abolish the distinctions between sealed and unsealed written instruments: See Sugden on Vendors, sec. 9, and notes; *Boyer v. McCulloch*, 3 Watts & S. 429; *Stevens v. Cooper*, 1 Johns. Ch. 430. This defense is usually made to bills for specific performance which are an appeal to the conscience and discretion of the chancellor, and it may come to be regarded as an equitable defense to an action upon the specialty. But though counsel make the point in their brief, it cannot arise in this case without proof of consideration for the parol agreement, which I have failed to find in the record.

The error of the circuit court was not in refusing the plaintiff's instructions because he asked too much, nor in overruling his objections to testimony, for it was competent as far as it went; but in the instructions, given at the instance of the defendant, that a verbal agreement merely to rescind, without new consideration, was sufficient to discharge him. There should have been something more. The sale must have been actually abandoned by both parties, and the property, as far as possible, restored to the vendor; or at least, if the agreement was unexecuted, it must have been founded upon a new consideration and clearly proved.

The judgment is reversed, and the cause remanded.

The other judges concurred.

ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN OR VARY INSTRUMENT IN WRITING: See *Emery v. Webster*, 66 Am. Dec. 274, and note 277; *Adair v. Adair*, 71 Id. 779, and note 785; *Martin v. Railroad Co.*, 73 Id. 713, and note 722; *Tesson v. Insurance Co.*, 93 Id. 293; *Pino v. Insurance Co.*, 92 Id. 529, and note 532; is admissible to prove that written contract is discharged, or that damages for its non-performance were waived, or that performance of part of the contract was dispensed with, but not to contradict or alter a written instrument: *Viele v. Germania Ins. Co.*, 96 Id. 83; is admissible to show the consideration of a contract to be illegal: *Patton v. Gilmer*, 94 Id. 665; or to show that a material written stipulation was founded on the misrepresentations and fraud of one of the parties: *Tatum v. Kelley*, 94 Id. 717.

EITHER WRITTEN OR PAROL EVIDENCE MAY BE ADMITTED TO APPLY INSTRUMENT TO SUBJECT-MATTER: *Pursley v. Hayes*, 92 Am. Dec. 350; *Wilson v. Cochran*, 86 Id. 574; *Prentiss v. Brewer*, 86 Id. 735, nota.

THE PRINCIPAL CASE IS CITED to the third point stated in the *syllabus* and approved, in *Russell v. Berkstresser*, 77 Mo. 425.

TULL v. DAVID.

[45 MISSOURI, 444.]

RELATION OF TRUSTEE AND CESTUI QUE TRUST IS USUALLY, as well in fact as in law, a relation of personal trust and confidence.

PURCHASER AT AUCTION SALE UNDER DEED OF TRUST IS NOT BOUND by a memorandum of the sale made by the trustee, who was his own auctioneer at the sale.

SUIT to recover the amount of a bid at an auction sale. The opinion states the case.

Hall and Oliver, for the appellant.

Vories and Vories, for the respondent.

By Court, CURRIER, J. This suit was brought to recover the amount of the defendant's bid at an auction sale under a deed of trust. The plaintiff was the trustee in the deed, and acted as his own auctioneer at the sale. The property was struck off to the defendant as the best bidder, and the plaintiff thereupon entered on the margin of the paper containing the advertised notice, and contiguous thereto, a memorandum of the sale, thus: "Sold to Herman David, for five hundred dollars." The notice described the property, and contained a statement of the terms of sale.

The defendant resists the collection upon the ground that the contract of sale was within the statute of frauds (Gen. Stats. 1865, p. 106, sec. 5), and that it was therefore invalid. It is insisted that the plaintiff, being a party to the sale, and a necessary party to the suit to recover the purchase-money, was incompetent to act in the transaction as the agent of the buyer; and it is therefore insisted that the memorandum of the sale made by him was invalid, and failed to bind the defendant. The position thus assumed by the defendant is undoubtedly sustained by the current of adjudicated cases, both English and American. Browne, in his work on frauds, states the matter thus: "One rule, however, has been settled, both under the fourth" (Gen. Stats. 1865, p. 438, sec. 5) "and seventeenth" (Gen. Stats. 1865, p. 438, sec. 6) "sections, that

neither party can be the other's agent to bind him in signing the memorandum. And it makes no difference that the pretended agent has not himself any beneficial interest in the contract, but stands in a fiduciary relation to third persons, so long as he is, in a legal point of view, the real party to and the proper one to sue upon the contract": See Browne on Frauds, sec. 367, and the authorities cited; also 3 Parsons on Contracts, 11, note *r*. In *Bent v. Cobb*, 9 Gray, 397 [69 Am. Dec. 295], Bigelow, J., reasons upon the subject as follows: "The great mischief intended to be prevented by the statute would still exist if one party to a contract could make a memorandum of it which could absolutely bind the other. If such were its true construction, it would be a feeble security against fraud, or rather, it would open a door for its easy commission. A vendor could fasten his own terms on his vendee. If it was a written contract binding on the purchaser, he could not show by parol evidence that the terms of the bargain were incorrectly or imperfectly stated. He could not vary or alter it by the testimony of those present at the sale. The publicity of a sale by auction would be no safeguard against false statements of the terms of sale made in the written memorandum signed by a party acting in the double capacity of auctioneer and vendor. The chief reason in support of the rule that an auctioneer, acting solely as such, may be the agent of both parties, to bind them by his memorandum, is, that he is supposed to be a disinterested person, having no motive to misstate the bargain, and entitled equally to the confidence of both parties. But this reason fails, where he is the party to the contract and the party in interest also. . . . Nor can it make any difference as to the power of the vendor to make the memorandum binding on the vendee, that the sale is made by the former in his representative or fiduciary character as executor, administrator, guardian, or trustee. He is still the party to the contract; the price is to be paid to him; he is to deal with the purchase-money; his interest and bias would naturally be in favor of those whom he represented; and what is more material, in case of dispute or doubt as to the terms of the contract, his duties and interests would be adverse to the vendee. He would stand in a relation which would necessarily disqualify him from acting as agent of both parties." The reasoning of Judge Bigelow commends itself to the approval of my judgment, and I adopt it in full. The circumstance that the trustee may have no beneficial interest in the subject of

the sale necessarily settles nothing as to his mental biases. By reason of his relations to the beneficiary, he may be as deeply interested in the results of the transaction as though he were the sole owner of the property, and the proceeds of the sale were coming to him alone. The relation of trustee and *cestui que trust* is usually, as well in fact as in law, a relation of personal trust and confidence.

The trustee may be the father or other near relative of the beneficiary, and if one trustee may act in the triple capacity of vendor, auctioneer, and agent of the buyer, why not all? Where is the line of distinction to be drawn between different trustees or classes of trustees? We are referred to no decided case that adopts the principle contended for by the plaintiff in this suit. The nearest approach to it is found in the case of *Wiley v. Roberts*, 27 Mo. 388, and *Stewart v. Garvin*, 31 Id. 36, where it is held that a sheriff, in selling lands under an order of court in proceedings for partition, is a competent agent of the parties to make a binding memorandum of the sales made by him; that a proper memorandum made by him binds the parties and withdraws the contract of sale from the influence of the statute of frauds. But the sheriff in such cases acts simply in the execution of a judicial power of sale, and not in strictness as a trustee. No title is vested in him. He acts merely as the instrument of the law in effecting the sale and conveyance. He is a public officer, and holds his position under the provisions of law, and not as the mere appointee of private parties. His public position and responsibility afford some security at least that his public duties will be discharged with uprightness and impartiality. At all events, this court has only gone to the extent of holding that a sheriff's memorandums of auction sales made by him in his official character were valid and binding on the parties, as being made by their duly authorized agent. It has not been held that executors, administrators, guardians, and other trustees are competent to act in the triple capacity of vendors, auctioneers, and agents of the parties, all at one and the same time, and so as to make their mere memorandums of sales binding on the parties as a written contract by them duly executed and delivered. Nor are we prepared to take that long step forward in that direction. We do not question the power of an auctioneer, who acts in that capacity alone, to make a memorandum of a sale at auction, which shall bind the parties, although it might be necessary to sue on the contract thereby evidenced

in the name of such auctioneer. We limit our decision strictly to the case at bar, holding that the memorandum appearing in this record was inoperative, as not being executed by the "party to be charged therewith, or some other person by him thereto lawfully authorized."

The judgment of the district court is reversed, and the cause remanded.

The other judges concurred.

AUCTIONEER IS AGENT OF BOTH PARTIES, and his memorandum of sale is generally binding on both, unless the auctioneer is himself the vendor: *Bent v. Cobb*, 69 Am. Dec. 295; compare *Craig v. Godfrey*, 54 Id. 299; *Doty v. Wilder*, 60 Id. 756; *Thomas v. Kerr*, 96 Id. 262, and full note on subject 270.

PURCHASE BY TRUSTEE OF TRUST PROPERTY: See *Buell v. Buckingham*, 85 Am. Dec. 516, and note. To support such purchase, the trustee must divest himself of his character as trustee, and enter into a new and distinct contract with the *cestui que trust*; and it must appear that the latter has the fullest information concerning the transaction and the trust, and that no advantage is taken by the purchaser of information acquired by him in the character of trustee: *Smith v. Townsend*, 92 Id. 637.

MECHANICS' BANK v. MERCHANTS' BANK.

[45 MISSOURI, 512.]

PURCHASER OF CORPORATE STOCK, AT SALE UNDER EXECUTION, ACQUIRES NO TITLE THERETO, if the defendant in the execution had none, nor will he acquire any greater or other rights than the seller had.

WHERE BANK CHARTER AUTHORIZES BOARD OF DIRECTORS TO MAKE RULES REGULATING TRANSFER OF STOCK, a by-law adopted by them, forbidding the transfer of stock so long as the owner is indebted to the corporation, is valid, although inconsistent with the general law of the state governing the transfer of property.

ACTION for the conversion of certain shares of stock. The opinion states the case.

Cline, Jamison, and Day, for the appellant.

T. T. Gantt, for the respondent.

By COURT, WAGNER, J. The plaintiff sued the defendant for the conversion of fifteen shares of stock. From the record it appears that the fifteen shares of the stock of the defendant were, on the first day of January, 1861, held by Alonson F. Doak, James D. Donnell, and John S. Williams, each holding five shares, the par value of which was one hundred dollars per share; that in September, 1861, Doak and Williams, being

then directors of the branch of the Merchants' Bank at Osceola, took from the vaults the sum of five hundred dollars each, in gold; that Donnell was then indebted to the Merchants' Bank in the sum of two thousand five hundred dollars, no part of which has been paid.

The charter of the bank, passed in 1857, and the amendments thereto, passed in 1864, were made part of the case. The amendatory act of 1864 contains the following: "The directors of the parent bank of the Merchants' Bank of St. Louis shall have power to make all by-laws, not inconsistent with any existing law of the state, for the management of its property, the regulation of its affairs, and the transfer of its stock; and the directors of any branch of said bank shall have a similar power, subject to the approval of the parent bank."

On the 26th of February, 1864, the directors of the parent bank at St. Louis adopted the following by-law: "Owners of stock, upon the surrender of the certificates of stock which may have been issued to them, may receive certificates of same, signed by the president and cashier, in such portions and sums as they may choose, and transfer thereof shall only be made on the books of the bank at St. Louis. But no transfer of stock shall be made so as to change the legal ownership thereof, except upon the transfer-book at the office where it shall be entered. . . . Nor shall any such transfer be made so long as the stockholder desiring to make such transfer is indebted in any manner to the bank."

It further appears that Doak and Williams, at the time of the taking of the gold as aforesaid from the vaults of the bank, declared that they thereby intended to take out the amount of their stock in gold; that, under judgments rendered at the March term, 1864, of the circuit court of Hickory County, executions were issued on the seventeenth day of that month in favor of the plaintiff and against Doak, Donnell, and Williams, and under these executions the sheriff levied on, advertised, and sold to the plaintiff the fifteen shares of stock. Upon the foregoing facts, the court below rendered judgment for the defendant. The question is, whether, by the judgment, levy, and execution sale, the plaintiff acquired any title to the stock as against the defendant.

One of the main incidents of property is its transferability. The power of disposing of stock, like the power of disposing of any other property, is a common right, and necessarily attaches to ownership. But while the transfer may not be totally re-

strained, it may be the subject of fixed and determinate regulations. Under the statutes relating to executions, shares of stock in an incorporated company, belonging to the defendant, may be seized and sold by the sheriff in the manner provided in the act: 1 Wagner's Statutes, p. 607, secs. 25, 26, 28. The regulation and manner of proceeding are prescribed, but the sale will not vest a title in the purchaser, if the defendant in the execution had none; nor will he acquire any greater or other rights than the seller had.

The rule announced in *Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149, is decisive of this case. It was there declared that the provision of a charter making the stock of a corporation personal property, and authorizing the board of directors to make rules and regulations concerning the transfer of the stock, subject to the general law of the state, authorized the board to adopt a rule prohibiting the transfer of stock until all debts due by the owner of the stock to the corporation should be paid, although such rule was inconsistent with the general law of the state governing the transfer of personal property.

In the present case, the amendment to the charter gave the board direct authority to adopt the by-law prohibiting the transfer of stock where the owner was in default. We see nothing inconsistent with justice and sound policy in such a proceeding. It is simply giving the corporation the right of set-off as against its defaulting stockholders. The equities of the plaintiff were certainly not superior to those of the defendant. Donnell was indebted to the defendant in the sum of two thousand five hundred dollars, which amount has never been paid. Doak and Williams took from the vaults of the bank five hundred dollars in gold, each. That amounted to more than the par value of the shares they respectively held. They were, then, all defaulters, and the defendant could not be coerced into the transfer of the stock till the arrearages were paid up. The principles governing this question were very fully discussed by this court in the case above alluded to, and it would be wholly supererogatory to restate them.

Judgment affirmed.

The other judges concurred.

PURCHASER AT SALE UNDER EXECUTION HAS ONLY TO SEE THAT OFFICER HAD COMPETENT AUTHORITY TO SELL, and did sell, and that the defendant in execution had title to the property sold: *Solomon v. Peters*, 92 Am. Dec. 69, and see cases cited in note 70.

VALIDITY OF BY-LAW OF CORPORATION IS PURE QUESTION OF LAW, to be determined by the court: *State v. Overton*, 61 Am. Dec. 671. What by-laws private corporation may adopt: See *Sayre v. Louisville etc. Assoc.*, 85 Id. 613, and extended note 617.

CORPORATION CANNOT BY MERE BY-LAW, IN ABSENCE OF STATUTE, BIND STOCKHOLDERS NOT ASSENTING THERETO for the payment of the corporate debts: *Flint v. Pierce*, 96 Am. Dec. 691, and note 692.

THE PRINCIPAL CASE IS CITED to the second point stated in the *syllabus* and approved, in *Spurlock v. Pacific R. R.*, 61 Mo. 326; and is cited to this point and distinguished in *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 253.

ADAMS v. HOMEYER.

[45 MISSOURI, 545.]

OWNER OF VESSEL WHO IS ALSO CARRIER HAS LIEN UPON GOODS FOR THEIR TRANSPORTATION, but it does not follow that he who has the title to the property employed in the transportation is necessarily the owner for the voyage. The owner of a vessel may lease it, give up all possession and control, reserving only rent, and in that case the lessee, although the lease assumes the form of a charter-party, becomes the owner for the term.

GENERAL OWNER MAY LET HIS SHIP WITH MASTER AND CREW OF HIS OWN CHOOSING, and if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint the master to control and navigate clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agents for the use of the charterer.

WHATEVER AGREEMENT EXISTS BETWEEN CONSIGNEES OF CARGO AND CHARTERER OF VESSEL, FOR APPROPRIATION OF RETURN FREIGHTS, the right of the master to collect them from the consignees after delivery to them of the goods, at least to the amount due on the charter-party, cannot be questioned. The delivery of the goods to the consignees, and their acceptance of them under the bill of lading, raises an *assumpsit* against them to pay freights according to the stipulations of the bill of lading; and this implied obligation becomes a positive one when the goods are received with notice that the freights must be paid to the master, and not to the charterer.

ACTION based on bills of lading in the usual form. The facts appear in the opinion.

M. L. Gray, for the appellants.

Krum and Decker, for the respondent.

By Court, BLISS, J. On the 12th of October, 1865, the plaintiffs and one Francis K. Capelle executed a charter-party, of which the following is a synopsis: The plaintiffs charter to Capelle, to run during the balance of the season, upon the Upper Mississippi, the steamer *Resolute* and three

barges; they agree and claim the right to provide the captain "to command and run" the steamer, and to furnish a man to take charge of and manage the barges, both of whom are to be paid by the plaintiffs. Capelle is to keep sufficient money in the hands of the clerk to pay expenses, which are to be paid promptly, and no debt for supplies, fuel, wages, or other liabilities against the steamer or barges is to be suffered to accumulate or to remain unpaid. Capelle is to insure the steamer for the benefit of the plaintiffs; is to pay plaintiffs "for the use and hire" of the steamer and barges eighty-five dollars per day, to be paid every fifteen days, until the charter is "terminated by the delivery of said steamer and all of said barges" to the plaintiffs, or until it is otherwise terminated. In case of loss or injury by the dangers of navigation, so as to render the steamer unfit for navigation and render the insurance company liable, Capelle may deliver to the plaintiffs the barges, "pay up the hire of said steamer and barges to the date of said delivery," and be discharged from liability for loss "and for further hire." Upon failure to pay expenses or liabilities of steamer or barges, or to keep it insured, or "to pay the hire" as stipulated, Capelle's rights under the charter are to be forfeited, and plaintiffs may, during the continuance of such failure, terminate the charter "and resume possession of said steamer and barges." Capelle is to deliver them to the plaintiffs at St. Louis, at the close of navigation, in good condition, unless the steamer shall be lost, when "he shall be discharged from all liability to deliver said steamer as aforesaid."

Shortly before the execution of said agreement, Capelle had agreed in writing to transport for defendant a quantity of wheat, at a given price per bushel, from the Upper Mississippi to St. Louis. As soon as he obtained the boat he sent it above for the wheat, Griffith, the captain, having been placed on board by the owners, according to the charter. Capelle advanced \$1,000 to pay expenses, and the evidence tended to show that he agreed to furnish more money at the bridge at the upper rapids, which he failed to do, and the captain drew on defendant for \$1,000.50, and for \$375; and some bills for coal, etc., were left unpaid. It was also shown that on the arrival of the boat in St. Louis, Capelle came aboard, and Captain Griffith demanded for the owners, under the charter-party, money to pay the hands and the charter-hire of the boat, and notified Capelle that unless these sums were paid

he would not let the shipment go out of the owners' hands; but Capelle paid nothing, and thereupon plaintiffs put into the hands of W. B. Russell & Co. the business of delivering the merchandise and collecting the freight for the owners; that defendant paid Russell & Co. some \$400, but refused to pay any more, claiming that he had paid the remainder to Capelle in his contract with him. There was also testimony tending to show that Capelle had complied with his contract, and that defendant refused to pay the drafts of the master upon him until authorized by Capelle.

The plaintiffs claim that they had a lien upon the wheat shipped for defendant for the freight or hire due them, which lien is not affected by the charter to Capelle; also, that the charter was forfeited by his fault, and that he lost all right to collect the freight which he might have possessed under it. That the owner and carrier has a lien upon goods for their transportation is nowhere disputed, but it does not follow that he who has the title to the property employed in the transportation is necessarily the owner for the voyage. The proprietors of a steamboat or ship, as well as of other property, may lease the same, give up all possession and control, reserving only rent; and in that case the lessee, although the lease assumes the form of a charter-party, becomes the owner for the term. The charter-party, instead of a contract of affreightment, becomes but a demise; and the temporary owner may carry for others, and they are responsible only to him.

This subject has been often before the courts of England and of this country, and the various rulings in the former are collected in chapter 2, part 4, of Abbott's Shipping. There does not seem to be perfect clearness and consistency in all the different cases, though, as affecting the question of lien, the above distinction between a demise and contract of affreightment is kept up throughout. Conceding that the owner for the voyage possesses this lien, the same difficulty in the construction of the charter-party has arisen on the American cases. The general owner, unless the contrary appears from the contract, must of necessity be considered the owner for the voyage; but he is competent to part with this ownership temporarily by demise, as well as permanently by absolute sale. In *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch, 39, I find on page 49 a description of this ownership which is often quoted in other cases. "A person may be the owner for the voyage," says the court, "who, by a contract with the general

owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship, but if the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo as freight for the voyage, the charter-party is considered a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership." Who, then, by the charter under consideration, had the exclusive possession, command, and navigation of plaintiffs' boat?

In the construction of contracts of this kind, there is nothing peculiar or technical, but, as in all other agreements, the intention of the parties is our polar star; and I confess that the intention in this regard seems more obscure than in any agreement of the kind that has fallen under my observation. I have given a correct abstract of all its provisions, and while some seem to contemplate a possession by Capelle, others provide that the owners shall retain the possession and navigation. Their right to furnish the captain "to command and run the boat," and the man to take charge of the barges, show that the general owners did not intend to give up the control of their property, and a contrary intention cannot be inferred from other parts of the agreement, unless it unequivocally appears. Such intention cannot be inferred from the fact that they were to receive a *per diem* for the use of their boat; for they may have as real a possession while running it in that manner as though receiving pay by weight or measure of the property shipped. Nor can it be inferred from the fact that the charterer is to pay the running expenses, for he may do that and still leave the owner in possession. On the other hand, the peculiarity of the contract in this respect would seem to imply that the charterer was not in possession; for instead of a general agreement to pay the expenses, he is not to disburse the money, but is to keep a sufficient deposit with the clerk for that purpose, indicating that it was to be disbursed by those in charge of the boat. Nor can anything be inferred from the repeated use of the term "hire," for the word may as well apply to the price for services as of a lease.

It is claimed, however, that the different provisions in the charter for delivering up possession to the owners are conclusive upon the question. They are certainly sufficient to throw doubt upon what would otherwise have been perfectly plain; and unless the whole instrument shows that these provisions have another meaning than what alone they would

naturally import, we must be compelled to hold that the charterer was to take actual possession. But when we find that the owners covenanted to furnish the men who should command and navigate both the boat and the barges, and when we also find the construction given by the acts of the parties in the fact that the master acted throughout as the agent of the owners in complying with their contract and endeavoring to enforce a compliance with his stipulations by the charterer, all strengthening and supporting the presumption of ownership, we are compelled, if possible, to find some other meaning consistent with the other provisions of the charter and with its practical interpretation.

What, then, must the parties have intended by the language used by them in relation to the surrender of possession at the termination of the contract? Clearly and only that at the time and on the occasions referred to, the contract should end; that the owners should then have the independent use and control, absolved from any obligation to run and carry exclusively for the charterer. This meaning renders the whole instrument, and the action of the parties under it, consistent and harmonious; while the one contended for would require that Capelle, who never was in actual possession, should yield possession to the owners, who had all along, by their own officers, though for Capelle's use, been running the boat and barges.

There are some authorities that seem to support the defendant's view, that the plaintiffs parted with their possession, and hence that they lost their lien for the freight. *Halton v. Bragg*, 7 Taunt. 14, is no longer considered as authority, and need not be considered. The most favorable American case that I have found is *Drinkwater v. Brig Spartan*, 1 Ware, 149. By the charter in that case, the owners let to freight the whole vessel, with appurtenances, the charterers to pay a monthly hire thirty days after the end of the voyage, pay all charges, and deliver her to the owners on her return to port. The owners relied upon the fact that one of them was named in the charter as at present master, as showing that the intention was not to part with the possession; but this master did not sail, and the charterers appointed a new master; and the court held the charter to be a demise, and not a contract of affreightment.

In *Pickman v. Wards*, 6 Pick. 248, the charterer was held to be the owner for the voyage, principally from the fact that he was allowed to appoint the master. In *Lander v. Clark*, 1 Hall, 355, the lien for freight is denied, upon the ground that

"the charter-party was an absolute demise of the ship for the voyage, and transferred the whole ownership of her *pro hac vice* to the charterer"; it appearing that the charterer, and not the owner, appointed the master, and otherwise controlled the ship.

The general owner may let his ship with a master and crew of his own choosing, and if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint the master to control and navigate clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agents for the use of the charterer. Cases seldom turn upon this provision alone, but it must always have great weight in arriving at the intention of the parties in regard to the constructive possession: See *Winsor v. Cutts*, 7 Me. 261; *Schooner Volunteer*, 1 Sum. 551; *Certain Logs of Mahogany*, 2 Id. 582.

Light may be thrown upon this question by considering the responsibility for loss or damage. Suppose, by the fault of the master, the cargo had been damaged, or a collision had occurred destroying another boat, whose agent would the master have been considered, and who would be compromised by his acts? Would he represent the charterer who had no power over his appointment, or the owners who placed him in command, and who alone had power to keep him or remove him?

The owners, then, should have a lien upon the goods for the stipulated freight, not to exceed the amount due from the charterer, and not to exceed what the defendants are owing under their freight contract. It is no defense that Capelle was owing them, or that they have paid him. They shipped "per steamer *Resolute*, Griffiths master," and knew with whom they were dealing, and the rights of carriers. "The respondents must be presumed to know the terms of the charter-party, and that they could not deal with the charterer as owner of the vessel for the voyage, her entire possession and control being reserved to the master and owners": *Shaw v. Thompson*, Olcott, 148. "Whatever stipulations may have been made between the defendants and the charterer for the appropriation of the return freights, the right of the master to collect them from the consignees after delivery to them of the goods, at least to the amount due on the charter-party, cannot be questioned": *Id.* "The delivery of the goods to the consignees, and their acceptance of them under the bill of lading, raised an *assumpsit* against them to pay freight according to the stipulations of the bill of lading. And this implied obligation becomes a positive

one when the goods are received, as in this instance, with notice that the freight must be paid to the master, and not to the charterer": *Id.* 149; see also *Faith v. East India Co.*, 4 Barn. & Ald. 630. The above quotations from *Shaw v. Thompson*, *supra*, leave nothing to be said in regard to defendant's liability in this form of action.

But there is evidence showing that defendant has paid various sums, either directly to plaintiffs or upon drafts by the master, amounting to some nineteen hundred dollars, with which he should be credited. Also, there are indications that the one thousand dollars, paid by the charterer upon the running expenses, might have been advanced for that purpose by the defendant. If so, he should also be credited with that sum; for it would be clearly inequitable to refuse to appropriate money advanced for the use of the boat in liquidation of its claims for freight.

The circuit court, in its instructions to the jury, took a different view of the questions discussed in this opinion, and its judgment is reversed, and the cause remanded.

The other judges concurred.

WHEN GENERAL OWNER OF VESSEL IS LIABLE FOR SEAMEN'S WAGES, AND WHEN NOT SO LIABLE: *Sheriffs v. Pugh*, 94 Am. Dec. 600.

RIGHTS OF PART OWNERS OF VESSELS GENERALLY: *Ward v. Ruckman*, 93 Am. Dec. 479; *Donnell v. Walsh*, 88 Id. 364, note.

CONSIGNEE OF CARGO IS NOT LIABLE FOR DEMURRAGE if the bill of lading contains no provision for the payment thereof, and certainly not if he assigns the bill of lading before any of the cargo has been delivered: *Gage v. Morse*, 90 Am. Dec. 155.

MASTER OF VESSEL IS, FOR MOST PURPOSES, AGENT OF OWNERS OF SHIP AND CARGO: *Butler v. Murray*, 86 Am. Dec. 355.

McCARTNEY v. GARNHART.

[45 MISSOURI, 593.]

USE OF TRADE-MARK WILL NOT BE RESTRAINED, unless it so closely resembles that of the complainant as to raise the probability of mistake on the part of the public, or of design and purpose on the part of the defendant to mislead and deceive.

SUIT to enjoin use of trade-mark. The opinion states the case.

S. S. Boyd, for the appellants.

Cline, Jamison, and Day, for the respondent.

By Court, CURRIER, J. The plaintiffs rectify whisky, and brand a class of their goods with a device which they claim as their trade-mark. The device consists of the representation of two anchors placed near together in an upright position, the upper parts inclining outward, with a rope attachment. Over the device, in circular form, are the initials "S. McC." The device and letters are stenciled upon the heads of barrels containing a particular article of whisky, known in the trade as "double anchor," or "double anchor whisky."

This suit is brought to enjoin the defendant from using in his whisky trade an alleged counterfeit or imitation of the plaintiffs' brand. The supposed imitation consists of the representation of two picks placed near together in an upright position, with the handles inclining inward. Between the handles is suspended a pair of balances or scales. The defendant's name is placed over the picks, and the words "Old Bourbon" underneath; the whole inscription reading "J. H. Garnhart's Old Bourbon." The defendant stenciled this brand upon the heads of his whisky barrels. He used the whisky thus put up and branded for his mountain trade, and called it "pick brand."

The "picks" in the defendant's brand are claimed to be an imitation of the "anchors" in the plaintiffs' brand. That is the only point of resemblance in the two brands insisted upon. In all other particulars they are wholly dissimilar. The respective brands are transferred to paper, and appear in the record, and are explained in the testimony.

The defendant's "picks" resemble the plaintiffs' "anchors" substantially as a real pick resembles a real anchor of reduced dimensions. One who would mistake a miner's pick for a diminutive anchor might confound the defendant's brand with that of the plaintiffs, and hardly otherwise. The pick in the defendant's brand is quite as good an imitation of the article intended to be represented as is the anchor in the brand of the plaintiffs of the nautical instrument there sought to be represented. The resemblance between the two brands is too slight to be likely to mislead; and there is nothing in the testimony which shows that the defendant sought to dispose of his whisky as that of the plaintiffs, or of the plaintiffs' rectification. No actual fraud is shown; nor is it shown that any one has in fact been misled by the defendant's brand, mistaking it for that of the plaintiffs. The plaintiffs' case hangs solely upon the supposed resemblance between the defendant's sten-

ciled pick and the plaintiffs' stenciled anchor, and the similarity of uses to which the two were respectively applied. We cannot found upon that resemblance and use the conclusion that the public are likely to be misled by it, to the prejudice of the plaintiffs, or to the prejudice of their customers.

To justify an injunction, as prayed by the plaintiffs, it should at least appear that the resemblance between the two brands was sufficiently close to raise the probability of mistake on the part of the public, or design and purpose to mislead and deceive on the part of the defendant. Neither sufficiently appears, and the judgment must therefore be affirmed.

The other judges concurred.

TRADE-MARK, WHEN ENTITLED TO PROTECTION: *Boardman v. Meriden Britannia Co.*, 95 Am. Dec. 270, and note 277; *Falkinburg v. Lucy*, 95 Id. 76, and note 90.

THE PRINCIPAL CASE IS CITED AND FOLLOWED in *Sanders v. Jacob*, 20 Mo. App. 98.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

**MAYOR OF NEW YORK v. HAMILTON FIRE IN-
SURANCE COMPANY.**

[39 NEW YORK, 45.]

CONDITION IN POLICY OF INSURANCE IS VALID WHICH DECLARES THAT NO ACTION SHALL BE SUSTAINABLE THEREON unless commenced within six months after a loss occurs, and is to be construed in connection with another condition in the policy, that the payment of losses shall be made in sixty days from the date of the adjustment of the proofs of loss. Thus construed, the limitation of six months does not begin to run until the expiration of sixty days from the date of said adjustment, when the right of action against the company is complete.

ACTION upon a policy of insurance. A condition in the policy was, "that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law, unless such suit or claim shall be commenced within the term of six months after any loss or damage shall accrue," etc. Another condition provided that "payment of losses shall be made in sixty days from the date of the adjustment of the preliminary proofs of loss by the parties." And it was still further provided that persons sustaining loss should forthwith notify the company in writing, and as soon thereafter as possible deliver to the company as particular an account of their loss as the nature of the case will admit, etc. The loss by fire occurred on the 5th of October, 1858, and the six months expired April 5, 1859. Preliminary proofs were served November 30, 1858, and amended proofs were served February

12, 1859. The action was commenced April 16, 1859. Other facts appear in the opinion. Judgment was for the plaintiffs, and the defendants appealed.

James Emott, for the appellants.

T. H. Rodman, for the respondents.

By Court, HUNT, C. J. The defense in this case is based upon a non-compliance with the contract of limitations created by the tenth condition of the policy. In *Roach v. New York and Erie Ins. Co.*, 30 N. Y. 546, the condition in question was held to be valid. We are bound to hold in the same manner in the present case. In *Ames v. New York Union Ins. Co.*, 14 Id. 253, it was held that this condition might be waived by the acts and declarations of the parties, and that it had been waived by the parties in that case. The condition is extremely stringent. It is in derogation of the rights of the assured as given by the statute of limitations of the state. It is often not known or not considered by the assured, and should only be permitted to prevent a recovery, when its just and honest application would produce that result.

The cases above cited also hold that this condition should be construed in connection with the other conditions of the policy, and so construed as to give the fullest possible effect to all.

The eleventh condition provides that "payment of losses shall be made in sixty days from the date of the adjustment of the preliminary proofs of loss."

The counsel for the appellants insist that the word "adjustment" is inaccurately used in this connection, that it is only appropriate in the settlement of marine losses, and then not by means of the action of parties themselves. This is not impossible. In the preceding condition, when it is said that "unless such suit or claim shall be commenced within the term of six months after any loss or damage shall accrue," the words "loss or damage" are not used with legal precision. "Within six months after the right of action shall have accrued" was no doubt what the parties intended. That construction would cut off five years and six months of the right to sue as given by law, and to hold that it extended as much farther as the right to serve and object to preliminary proofs might require, with sixty days added to that, would require of the sufferer very prompt action indeed, to enable him to receive any benefit from his policy.

But the condition gives the company sixty days from the date of the "adjustment of the preliminary proofs of loss by the parties" before the loss is payable. To "adjust," in its fair meaning, is to settle or bring to a satisfactory state, so that parties are agreed in the result: Webster. And that this is a fair reading in the present case is evident from the use of the words "by the parties" at the close of the condition. The preliminary proofs are to be adjusted by the parties. The parties are to act upon them by negotiation,—by statements on the one side, demands for correction or addition on the other, by compliance with such requests, until the parties agree. If they do not agree, it can hardly be termed an adjustment by the parties, although the law may itself determine the sufficiency of such proofs. In the present case, the parties had not adjusted the proofs so recently as the 12th of February, 1859, when additional proofs were served, and possibly not as late as the 18th of that month, when the defendants made a demand of still further proofs. I infer that the plaintiffs relied upon their last proofs as sufficient, and refused to furnish any other, as the case contains no evidence of any further action in that respect. If, however, we fix the time when the preliminary proofs were complete, as on the 12th of February, 1859, the defendants were under no obligation to pay, and no suit could successfully be commenced against them until sixty days from that date. This is the period, in my judgment, at which the claim or right to sue becomes perfected against the company. At the end of these sixty days, the period of six months commences to run. This I understand to be the necessary result of the reasoning of Judge Wright in *Ames v. Union Ins. Co.*, 39 N. Y. 264, 265. At this time, and not before, the plaintiffs could have commenced their action. The object was to compel an early litigation, within six months after the right to sue attached. The suit was commenced on the 16th of April, 1859, which, in my view of the case, was within four days of the time in which the plaintiffs would have been justified in instituting the proceeding. The preliminary proofs were first served on the 30th of November. No objection appears to have been made that they were not served in time. If the six months were counted from that date, a rule much too favorable to the defendants, the suit would still have been commenced in time.

Judgment should be affirmed, with costs.

Judgment affirmed.

STIPULATION IN POLICY OF INSURANCE THAT NO RECOVERY SHALL BE HAD UNLESS SUIT is brought within a certain time is a valid condition, and unless it is complied with, there can be no recovery: *Patrick v. Farmers' Ins. Co.*, 80 Am. Dec. 197; *Fullam v. New York Union Ins. Co.*, 66 Id. 462, and note 464; *Ripley v. Aetna Ins. Co.*, 86 Id. 362, and cases collected in note 371; *Keim v. Insurance Co.*, 97 Id. 291.

THE PRINCIPAL CASE IS APPROVED and followed in the construction of a similar condition in policies of insurance in the following cases: *Steen v. Niagara Fire Ins. Co.*, 61 How. Pr. 146; S. C. affirmed, 89 N. Y. 323; *Barnum v. Merchants' Fire Ins. Co.*, 97 Id. 195.

MILBURN v. BELLONI.

[89 NEW YORK, 53.]

SELLER WHO WARRANTS THING SOLD AS FIT FOR CERTAIN PURPOSE IS LIABLE for any injury sustained by the buyer, in consequence of its unfitness; and the measure of damages is not simply the difference in value between the article contracted for and the article received.

ACTION for breach of warranty. The plaintiff bought coal-dust from the defendants, to be used in making brick, stating at the time of the purchase that if mixed with soft coal-dust it would damage or destroy his brick. The defendants warranted it free from soft dust; but it was in fact intermixed therewith, which injured, and to some extent destroyed, the brick intended to be manufactured. The damage sustained in this manner was determined by the referee, and reported in favor of the plaintiff. The judgment entered upon this report was reversed below, upon the ground that the rule of damages was the difference in value simply between the article contracted for and the article received. The plaintiff appealed.

D. C. Ringland, for the appellant.

Gilbert Dean, for the respondents.

By Court, HUNT, C. J. The order reversing the report of the referee does not state that it was reversed on the ground of error in fact. It must therefore be held to have been reversed upon questions of law merely: Code, sec. 272. In such case, it is settled by numerous decisions that, in its consideration in this court, all facts not expressly stated are to be assumed in support of the report, and that any fact, the reverse of which is not found by the report, may be invoked in its aid: *Grant v. Morse*, 22 N. Y. 323; *Bennett v. Brown*, 20

Id. 100. There is fair evidence upon which the referee might have found that the vendor warranted the dust as fit for the making of brick. In the present case, we may, upon this principle, hold it as the fact that when the plaintiff purchased the dust in question, he stated to the defendants that he wanted it to use in making brick; that if it had in it any soft dust it would destroy his brick; that the defendants sold and warranted it to be used for that purpose, and as free from the objectionable material; and that if it had been so free it would have made good brick.

It is apparent from the whole tenor of the report that such was in truth the understanding and intention of the referee. In the recent case of *Passinger v. Thorburn*, 34 N. Y. 634 [90 Am. Dec. 753], all the cases are reviewed by Judge Davies. There the defendant had sold a quantity of cabbage seed, and had warranted that it would produce Bristol cabbage. It turned out to be seed of an inferior quality, and the crop produced was of little value. Under the ruling of the judge, the jury gave the plaintiff as damages the value of the crop as it would have been if of Bristol cabbage, as ordinarily produced that year, deducting the expense of raising the crop, and deducting also the value of the crop actually raised thereupon. This principle was sustained in this court. The case of *Sneed v. Ford*, 107 Eng. Com. L. 612, laid down the rule that the plaintiff was entitled to recover the damages which are the natural consequences of the breach of the contract. A machine to be used for thrashing wheat was not delivered at the time agreed upon, in consequence of which the wheat was stacked, and afterward injured by the rain. This injury, and the loss and expense which it involved, were held to be the natural results of the defendant's delay.

In *Bonadaile v. Bruzton*, 8 T. R. 535, the loss of the anchor was held to be a natural result of the insufficiency of a cable sold for holding an anchor, and warranted to last for two years.

In *Brown v. Edgerton*, 2 Man. & G. 279, the loss of a pipe of wine by the breaking of a rope attached to a crane, sold for that use, was held to fall properly within the scope of damages for selling an insufficient rope to be used upon such crane.

The case of *Passinger v. Thorburn*, *supra*, is decisive of the present case.

I think the rule of damages was right, and that the order

granting a new trial should be reversed, and the judgment of special term should be affirmed.

Order reversed.

MEASURE OF DAMAGES FOR BREACH OF EXPRESS WARRANTY: See *Tuttle v. Brown*, 64 Am. Dec. 80, and cases collected in note 83; *Fisk v. Fank*, 78 Id. 737; *Cary v. Gruman*, 40 Id. 303, note.

ON BREACH OF SPECIAL WARRANTY, PLAINTIFF IS ENTITLED TO SUCH DAMAGES as were the natural and necessary consequences of the breach: *Passinger v. Thorburn*, 90 Am. Dec. 753, and note 760.

THE PRINCIPAL CASE IS CITED in support of the rule stated in the *syllabus*, in *Parks v. Morris & Tool Co.*, 54 N. Y. 592; *Van Wyck v. Allen*, 69 Id. 69; *White v. Miller*, 71 Id. 133; *Zuller v. Rogers*, 7 Hun, 542; *Schutt v. Baker*, 9 Id. 557; *Fox v. Everson*, 27 Id. 358; and is distinguished in *Edwards v. Colson*, 5 Lans. 323.

ERNST v. HUDSON RIVER RAILROAD COMPANY.

[89 NEW YORK, 61.]

NO RULE OF LAW REQUIRES RAILROAD COMPANY TO KEEP FLAGMAN AT STREET OR ROAD CROSSING to give notice of the approach of trains, and the omission to do so is not negligence, unless the company, by an established and hitherto uniform practice of that kind, have given ground for expectation that such warning would be given.

TRAVELER APPROACHING RAILROAD TRACK IS BOUND TO USE HIS EYES AND EARS, so far as there is opportunity; and negligence of the railroad company in giving signals will not excuse his omission to be diligent in such use of his own means of avoiding danger.

WHEN QUESTION WHETHER TRAVELER USED ORDINARY CARE AND PRUDENCE, IN ANY GIVEN CASE, becomes so complicated and involves so many details that honest and intelligent men, acting without bias or partiality, in a single and sincere desire to determine according to the truth, may reasonably differ in their conclusions, then the question should be left to the jury.

THE opinion states the case.

By Court, CLERKE, J. This action was brought to recover damages against the defendant for negligently causing the death of the plaintiff's testator, and has been tried four times. Upon the first trial the plaintiff was nonsuited; a new trial having been granted, the cause was tried a second time, and the plaintiff recovered two thousand five hundred dollars, upon which judgment was entered. This was reversed in the court of appeals, and a new trial ordered. On the third trial the plaintiff was nonsuited in accordance with the decision of this court. This was affirmed at the general term; but on a second appeal to this court, the judgment of the supreme court

was reversed, and a new trial ordered. On the fourth trial the plaintiff had a verdict for five thousand dollars. The judgment upon this verdict having been affirmed at the general term, the defendant appeals to this court.

The judge, at the trial, charged the jury that the first question which they were to consider was, whether the defendant was guilty of negligence which caused the death of the plaintiff's testator. On this question there was conflicting evidence. The plaintiffs witnesses, and some of the defendant's, testified that they did not hear the bell or whistle previous to the accident; while the engineer, fireman, and track-master testified that these signals were given. So that this question, relative to the defendant's negligence, was properly left to the jury. The judge added, if they should come to the conclusion that the defendant was guilty of negligence, then the question would be, Was the deceased free from negligence which contributed to the accident? The defendant's counsel asked the court to charge, if the deceased, by the use of his ordinary faculties, could have discovered the train, and could have avoided the injury, he was guilty of negligence, and could not recover; and this the court accordingly charged.

The counsel for the defendant moved, at the conclusion of the plaintiff's evidence, for a nonsuit, on the ground,—1. That there was no proof of negligence on the part of the defendant; and 2. That it appeared that the negligence or want of care of the plaintiff's testator contributed to the injury. The motion was denied. It was, however, renewed at the close of the whole evidence, and was then also denied. As I have already intimated, there can be no doubt that the question regarding the defendant's negligence was properly left to the jury. The second ground of the motion for the nonsuit is more plausible. On the legal proposition which this latter question involves, I cannot discover any difference of opinion between any of the judges by whom the case has been considered. All seemed to assume, at the trial at the general term, and in the court of appeals, that the plaintiff must make out a clear, affirmative case of negligence on the part of the defendant, unaccompanied by any negligence on the part of the deceased that contributed to the injury; and the question now is, Was the negligence of the deceased so obvious and uncontradicted by the evidence as that nothing was left on this point for the consideration of the jury? I cannot find any substantial difference in the evidence bearing on this point adduced at the trial before the last, and

the evidence adduced at the last trial. There were some more witnesses examined on behalf of the defendant; their evidence, perhaps, tended to contradict that of the plaintiff; but by no means made it more manifest that the judge should have nonsuited the plaintiff on the ground of the uncontradicted negligence of the deceased.

At the last trial all the facts were proved which were proved at the one that preceded it; and these were very succinctly stated in the following synopsis, contained in the opinion delivered by Judge Hunt when the case was last in this court: —

“On the day in question, the deceased drove his empty sleigh with a pair of horses into the village of Bath, intending to cross the ferry to Albany. The boat was not ready, and he fastened his horses in front of the tavern and went in. In a short time, notice was given that the boat was ready; his associates crossed over the track in their sleighs, one of them remaining near the track to assist the deceased, the others reaching the boat. The deceased came out, unhitched his horses, sat upon the bottom of his sleigh, drove northerly a few feet, turned westwardly, drove 112 feet toward the ferry, when he reached the railroad track, when his horses were struck by the engine and cars going southwardly, his horses killed, and himself so badly injured that he died within a few days thereafter. As he drove northwardly from the hotel he could see up the railroad a distance of thirty rods. After turning westwardly toward the ferry, and going a short distance, the view of the road northerly was cut off by the station-house, a building extending about fourteen feet in a direction easterly and westerly. As the deceased approached the train he was driving on a moderate trot; he was shouted at three times by a man standing on the steps of a store adjoining the track that the cars were coming, to which he paid no apparent attention. Whether he heard or understood does not appear. One of the railroad hands, east of the track, made motions to him, intended by the maker as signals to stop; and one of his own comrades, Simmons, on the west side of the track, made signs intended by him to effect the same purpose. The deceased drove on at a moderate trot till he reached the track. The train, as one witness testified, was running at a speed of fifty miles an hour, which would carry the train over the thirty rods in about fourteen and one sixteenth seconds. The deceased was a frequent passer at this place; and it had been

the established custom there for some years that a flagman with a white flag should signal the approach of cars not intended to stop, and with a red flag when the train was expected to stop."

On these same facts, which appeared on the trial that we are now reviewing, we were asked to decide that the judge should have nonsuited the plaintiff, when, by the decision rendered by this court on its last consideration of the case, it was held that these facts were sufficient to carry it to the jury. No new proof has been given or withheld; no circumstances have occurred which could justify us for a moment to overrule the former decision. Nothing could justify this but a very palpable misapprehension of the facts, or a very palpable mistake of the law. At neither trial, indeed, was there any positive proof that the deceased directed his vision up or down the road. But may he not have done so — nay, do not the circumstances make it probable that he did so — before he reached the station, which then obstructed his view? We have seen that, as he drove northward from the hotel, he could see up the railroad a distance of thirty rods, and then, seeing no approach of the train, nor anything indicating its approach, he ventured to cross. We are to infer from the verdict at the last trial that the jury decided that no whistle was sounded and no bell rung as the train approached the crossing; now, if ever there was positive proof that the deceased neglected to look up or down the track, would it be negligence in him not to have done so, in the absence of the customary and legally required signals? I am not aware that this court has decided, or that there is a current of authority anywhere deciding, that when a railroad company neglects to give these signals, the want of ordinary care can be imputed to a person crossing the track, if he omits to look up and down just before he crosses. The absence of the accustomed signals is calculated to impart an assurance of safety, particularly to one who is in the habit of crossing the same spot frequently, and who, perhaps, has never before known of their omission; and can it be correctly alleged that he is guilty of negligence if he abates his usual vigilance under such circumstances? I think that it would not be unreasonable to recognize such negligence on the part of a railroad company as a proper element for the jury, in considering all the circumstances relating to the question of negligence on the part of the deceased. Any contributory negligence of a person attempting to cross, no

doubt, excuses the company, whether it does or does not use the required signals, or is or is not guilty of any other negligence.

But, I repeat, is it reasonable to impute negligence to a person who frequently, for years, is accustomed to hear signals, if he omits on one occasion, when they are withheld, to look up or down the road immediately before crossing? At all events, there is nothing in the proof to show that the deceased neglected to look when his horses, on turning them round from the place where they were hitched, faced the north, and where he had an unobstructed view of the crossing, and of the railroad track for thirty rods north of it. The fact that the witnesses failed to observe that he afterward did not look up or down the track, is not of itself certain proof of the want of ordinary care on his part.

In my opinion, this court, in its last review of this case, in no respect relaxed the salutary rules which it had in many previous cases adopted in relation to the negligence of persons who are on railroads. In neither of the opinions delivered on that occasion is the rule ignored or modified,—that when the injured person has not used ordinary care, there can be no recovery against the company. They only in effect intimate that what is want of ordinary care is a question depending for the most part upon the facts and circumstances of each particular case.

The last decision in this case, *Ernst v. Hudson R. R. Co.*, 35 N. Y. 9, is not, I think, at variance substantially with the legal propositions and deductions of the previous decision: *Ernst v. Hudson R. R. Co.*, 24 How. Pr. 97. The latter was based evidently on a mistaken statement of the facts, which, if true, would have justified the court in concluding that the deceased was guilty of negligence. The real facts, and the facts which were proved at the last trial, I repeat, authorized the judge to send the issues and evidence to the jury, in conformity with the decision of this court in its last review of this case; and if he had not done so the nonsuit would unquestionably be set aside.

The judgment should be affirmed, with costs.

WOODRUFF, J. Without attempting an extended discussion in a case which has been the subject of repeated and extended discussion already, I prefer to state briefly the propositions to which my assent is given, for in my judgment the case itself

involves rather the application of settled principles of law to the evidence than any serious contest about the principles themselves.

1. That the plaintiff was bound to prove that the defendants were guilty of negligence, and that an omission to ring the bell or blow the whistle on approaching a road-crossing is negligence, is not disputed.

Whether, in this case, the defendants did or did not ring the bell was in dispute, and the testimony was conflicting. It was therefore proper to leave that question to the jury.

2. The charge of the judge seems to assume that it was the duty of the defendants to keep a flagman at the crossing to give notice of the approach of the train, and that their omission to do so is *per se* negligence. There is, I think, no such rule of law, and the court would not be warranted in giving such an instruction to the jury. It cannot be said affirmatively that any such duty rests upon the company. No statute requires it. The company have the right to run their trains carefully and prudently on the track which they are by law authorized to construct and use; and if they do this, then it is the duty of those who have an equal right to use the highway at the crossing to avoid them, provided they give the warning prescribed by the statute.

In determining whether the company were duly and reasonably careful in the running of their train, it is not necessarily enough, under all circumstances, that they give the statute warning. The rules of the common law prescribing reasonable care in the exercise of their own right, that others, also in the careful exercise of their own rights, may not be injured, still rests upon them; and such care, where the danger to others is greater, as in cities or towns, may require them to slacken their speed, and move their ponderous engines with very great caution and circumspection, because they are so powerful for harm. But doing this, it cannot be said that they are also bound to place a man at the crossing, in addition to such care and caution.

True, if the company elect to do so, as they may for their own convenience, they will thereby render it proper to run with greater speed and less caution on the part of the managers of the train. But the law does not require it, however stringent in requiring care in the management of the train itself.

But there is no exception to the charge in this respect.

Besides, the company, by their own practice, may make a law for themselves. If they had an established and hitherto uniform practice on the subject, which was notorious, and known to be so, then to withdraw the flagman, when their own conduct had justified the expectation of all who were in the habit of using the highway, that warning by the flag would be given, would be improper, and be a neglect of suitable precautions, unless increased vigilance and care in the management of the train, or the employment of other means, furnished equivalent assurance of safety.

3. That if the intestate was guilty of negligence contributing to the result, the plaintiff was not entitled to recover, is not denied. This was so charged on the trial.

The question is, Where do the proofs clearly establish such negligence, so that the court should have granted a nonsuit or given a peremptory instruction to find for the defendant? Whatever I might conclude to be the preponderance of the evidence, the case seems to me one in which, upon this question, honest, intelligent, and impartial men may rationally differ. And if the doubt be such that such men, acting under a sense of great responsibility, and with a single purpose to arrive at the truth, may reasonably come to opposite conclusions, then it is proper to submit the question to the jury, and a nonsuit should not be ordered by the court.

A traveler approaching a railroad track is bound to use his eyes and ears, so far as there is opportunity.

Negligence in the railroad company in the giving of signals, or in omitting precautions of any kind, will not excuse his omission to be diligent in such use of his own means of avoiding danger. And where, by such use of his senses, the traveler might avoid danger, notwithstanding the neglect to give signals or warning, his omission is concurring negligence, and should be so peremptorily declared by the court; and where proof of this is clear, the plaintiff thus negligent should be nonsuited.

But where it is doubtful, as I think it is in this case, under all the circumstances testified to, whether the traveler did or did not look up and down the track as far as he could see it; whether, in the short distance he had to drive, he could, if he did look, see the approaching train; whether the train came into view (considering the speed at which it was running, according to the testimony of some of the witnesses) until the moment when he reached the station-house, where his view

was necessarily obstructed; whether he was not misled by the failure of the company to show the flag, as they had been accustomed to do; whether the attempts made to stop him were not, under the circumstances, liable to misinterpretation, and might not be reasonably interpreted by a cautious person to be intended to hurry him forward, so as to reach the ferry-boat, then in waiting, instead of warnings to stop; and so, finally, the question whether he used ordinary care and prudence becomes so complicated, and involves so many details, that honest men, acting without bias or partiality, in a single and sincere desire to determine according to the truth, may reasonably differ in their conclusions,—then the question should be left to the jury.

For these reasons, I concur in the result at which others of my brethren have arrived, viz., that the judgment should be affirmed.

BACON, J. I concur in all respects in the foregoing opinion, and put my assenting vote for affirmance upon the same grounds.

MASON, J. I concur in this opinion in all respects, save I prefer to express no opinion upon the question whether, under any circumstances, the railroad company should be required to place a flagman at a road-crossing.

Affirmed.

CARE AND DILIGENCE REQUIRED OF RAILROAD COMPANIES IN CONDUCTING THEIR TRAINS, GENERALLY: *Baltimore etc. R. R. Co. v. State*, 96 Am. Dec. 528; *North Cent. R. R. Co. v. State*, 96 Id. 545, and note 553; *Toledo R. R. Co. v. Harmon*, 95 Id. 489.

DUTY OF RAILROAD COMPANY TO GIVE WARNING OF DANGER AT CROSSINGS: *Wakefield v. Railroad Co.*, 86 Am. Dec. 711, and cases in note 715; *Philadelphia etc. R. R. Co. v. Spearen*, 86 Id. 544; *Chicago etc. R. R. Co. v. Still*, 71 Id. 236; *Milwaukee etc. R. R. Co. v. Hunter*, 78 Id. 699, and note 706.

DUTY OF TRAVELER TO LOOK OUT FOR APPROACH OF TRAINS AT CROSSING: *Pennsylvania R. R. Co. v. Ogier*, 78 Am. Dec. 322, and note 327.

DUTY OF RAILROAD COMPANY TO KEEP FLAGMAN OR OTHER PERSON AT CROSSING TO GIVE WARNING OF APPROACHING TRAINS OR CARS.—The common law imposes upon railroad companies, when running their engines or trains over crossings, the exercise of reasonable care and diligence, to prevent injury therefrom to travelers on the road. It is the duty of the company to operate its road with due regard to the rights and the safety of the traveling public: *Delaware etc. R. R. Co. v. East Orange*, 41 N. J. L. 127, 130; *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259; *Pennsylvania R. R. Co. v. Horst*, 110 Id. 226; *Byrne v. New York etc. R. R. Co.*, 104 N. Y. 362; S. C., 58 Am. Rep. 512; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391;

S. C., 54 Am. Rep. 718. But, as a general rule, a railroad company is not bound to keep a flagman at the points where its road intersects public streets and highways, to warn travelers of approaching trains, unless a statute or an ordinance of a municipal corporation requires it to do so: *Beisiegel v. New York Central R. R. Co.*, 40 N. Y. 9; *Sutherland v. New York Cent. R. R. Co.*, 9 Jones & S. 17; *Weber v. New York Cent. R. R. Co.*, 58 N. Y. 451; *Pennsylvania R. R. Co. v. Matthews*, 36 N. J. L. 531; *Delaware etc. R. R. Co. v. Toffey*, 38 Id. 525; *Delaware etc. R. R. Co. v. East Orange*, 41 Id. 127; *State v. Philadelphia etc. R. R. Co.*, 47 Md. 76; *Philadelphia etc. R. R. Co. v. Kellips*, 88 Pa. St. 405; or unless the company has "made a law for itself," by its custom of keeping a flagman at such points: See *McGrath v. New York Cent. etc. R. R. Co.*, 1 Thomp. & C. 246, citing the principal case; *Spencer v. Illinois Cent. R. R. Co.*, 29 Iowa, 55; and a general submission to the jury of the question, without qualification or limitation, whether the railroad company should keep a flagman stationed at a particular point, is held to be error: *Beisiegel v. New York Cent. R. R. Co.*, 40 N. Y. 9; *Grippen v. New York Cent. R. R. Co.*, 40 Id. 34; *Dyer v. Erie Railway Co.*, 71 Id. 228; *Sutherland v. New York Cent. R. R. Co.*, 9 Jones & S. 17; the question whether flagmen are required to be kept at every crossing is not to be left to the caprice of juries: *Pennsylvania R. R. Co. v. Matthews*, 36 N. J. L. 531, 534; and see *Cliff v. Midland Ry Co.*, L. R. 5 Q. B. 258; *Bilbee v. Railway Co.*, 18 C. B., N. S., 584; *Toomey v. Railway Co.*, 3 Id. 146.

It is for juries to say whether a railroad company, sought to be charged for alleged negligence, has, in the operation of its trains and the conduct of its business, used that degree of care and prudence which the circumstances and its obligation to others required; but beyond this they cannot go: *Allen, J.*, in *Weber v. New York Cent. R. R. Co.*, 58 N. Y. 451. It is held, nevertheless, that the presence or absence of a flagman at a crossing may be considered by the jury as a part of the *res gestae*, as bearing upon the degree of care and caution with which a railroad company runs its trains: *McGrath v. New York Cent. etc. R. R. Co.*, 63 Id. 522; *Casey v. New York Cent. etc. R. R. Co.*, 6 Abb. N. C. 104; S. C., 78 N. Y. 518, 523, citing the principal case; so it may be shown, as part of the *res gestae*, that it had been the custom of the railroad company to have a flagman at a particular crossing, as tending to show negligence, by the omission to have one on the particular occasion when an accident occurred: Id.; and see *Dolan v. Delaware etc. Canal Co.*, 71 Id. 235; *Spencer v. Illinois Cent. R. R. Co.*, 29 Iowa, 55; *St. Louis etc. R. R. Co. v. Dunn*, 78 Ill. 197. And according to many of the decisions, although, as a general rule, a railroad company is not bound at common law to keep a flagman at a crossing, it is nevertheless required to do so when its road is so constructed as to make it unnecessarily hazardous. The rule is, that when the company has created extra danger, it is bound to use extra precautions, and this may demand the placing of a flagman at a crossing: *Delaware etc. R. R. Co. v. Toffey*, 38 N. J. L. 525; *Delaware etc. R. R. Co. v. East Orange*, 41 Id. 127; *New York etc. R. R. Co. v. Randel*, 47 Id. 144; and see *Richardson v. New York Cent. R. R. Co.*, 45 N. Y. 846; *Lehigh Valley R. R. Co. v. Brandtmaier*, 113 Pa. St. 610; *Bailey v. New Haven etc. R. R. Co.*, 107 Mass. 496; *Roberts v. Chicago etc. R. R. Co.*, 35 Wis. 679; *Stapley v. Railway Co.*, L. R. 1 Ex. 121; *Stubley v. Railway Co.*, 1 Id. 13. Independently of legislative requirement, if the circumstances are such as to render it dangerous to run a locomotive across a highway, without previously giving warning of its approach, it will be deemed negligence to omit such warning, and this will ordinarily present a question of fact for the jury: *Shaber v. St. Paul etc.*

R. R. Co., 28 Minn. 103; *Loucks v. Milwaukee etc. R. R. Co.*, 31 Id. 526; *Howard v. Railroad Co.*, 32 Id. 214; and see *Longenecker v. Pennsylvania R. R. Co.*, 105 Pa. St. 328; *Pennsylvania R. R. Co. v. Coon*, 111 Id. 430; *Commonwealth v. Boston etc. R. R. Co.*, 101 Mass. 201; *Railroad Co. v. Commonwealth*, 13 Bush, 388; and it was held to be a question for the jury to determine, whether the presence of a flagman, or other precautions not taken, were reasonably necessary for the safety of the public, at a railway crossing in a populous city, where the accident occurred: *Bolinger v. St. Paul etc. R. R. Co.*, 36 Minn. 418; and see *Kelly v. St. Paul etc. R. R. Co.*, 29 Id. 1; but compare *Beisiegel v. New York Cent. R. R. Co.*, 40 N. Y. 9, to the effect that it cannot be left to a jury to find, from the mere fact that a street is in a populous town and is much used, whether it is incumbent on a railroad company, whose track intersects such street, to station a flagman at such point: And see *Grippen v. New York Cent. R. R. Co.*, 40 Id. 34. But compare *Beisiegel v. New York Cent. R. R. Co.*, 34 Id. 622; S. C., 90 Am. Dec. 741.

The railroad law of Michigan lays upon the railroad commissioners of the state the duty of determining the necessity of placing a flagman at any particular street-crossing of a railway; and the absence of a flagman at such crossing is no evidence of negligence on the part of the railroad company, unless the necessity for stationing and maintaining a flagman there has been determined upon and required by the railroad commissioner: *Battisill v. Humphrey*, 31 N. W. Rep. 894 (Mich.); S. C., 29 Am. & Eng. R. R. Cas. 411.

OTHER CITATIONS OF PRINCIPAL CASE, in addition to those given in the foregoing note, are as follows, and to the points stated: It may now be regarded as settled that a traveler approaching a crossing is required to use his eyes and ears in looking, and listening to ascertain whether trains are approaching, irrespective of the question whether the signals required by statute are given upon the train, and that if an injury is received in consequence of his omission so to do, he cannot recover therefor: *Havens v. Erie R'y Co.*, 41 N. Y. 299; *Beisiegel v. New York Cent. R. R. Co.*, 40 Id. 11; S. C., 14 Abb. Pr., N. S., 30; *Harty v. Central R. R. Co.*, 42 N. Y. 473; *Warner v. New York Cent. R. R. Co.*, 44 Id. 489; *Gorton v. Erie R'y Co.*, 45 Id. 664; *Stackus v. New York Cent. etc. R. R. Co.*, 7 Hun, 562. The issue of negligence is required to be submitted to the jury, when it depends upon conflicting evidence, or on inferences to be deduced from a variety of circumstances, in regard to which there is room for fair differences of opinion among intelligent men: *Barrett v. Third Ave. R. R. Co.*, 8 Abb. Pr., N. S., 210; S. C., 1 Sweeny, 573; *Northrup v. New York etc. R. R. Co.*, 37 Hun, 297; *Bradley v. Second Ave. R. R. Co.*, 8 Daly, 291. Where a railroad company has customarily given signals in passing crossings, one who is about to cross the company's track has a right to assume that the signals will be given: *Roll v. Northern etc. R. R. Co.*, 15 Hun, 502.

THE PRINCIPAL CASE IS DISTINGUISHED in *Gonzales v. New York etc. R. R. Co.*, 39 How. Pr. 414; but compare Id. 426, note.

TAYLOR v. BRADLEY.

[89 NEW YORK, 129.]

AGREEMENT TO LET FARM FOR TERM OF YEARS, EACH PARTY TO FURNISH PART OF STOCK, seeds, tools, etc., and one to occupy and work the farm and have certain specified supplies for his family, after which all proceeds to be divided equally, is to be regarded as a special contract, and the measure of damages for a breach thereof by the owner of the farm is the value of the contract, that is, what such a privilege of occupancy and working the farm, subject to the conditions of the agreement, and under all the contingencies which were liable to affect the result, is worth.

ACTION FOR DAMAGES FOR BREACH OF CONTRACT TO LET FARM ON SHARES IS MAINTAINABLE IMMEDIATELY upon the refusal of the owner to perform, without awaiting the expiration of the term. Whether the opinion of witnesses are admissible in evidence to prove the value of such a contract, *quære*.

ACTION for the breach of a sealed contract to let a certain farm. The material parts of the contract appear in the opinion. Before the commencement of the term the defendant, Bradley, who then had merely a contract for the purchase of the farm, and not the legal title, assigned his contract to one Ingraham, who took a conveyance, entered into possession, and refused possession to the plaintiff. The plaintiff then hired another farm, and removed thereto. Evidence of the necessity and the cost of the plaintiff's hiring the latter farm, and the expense of removing thereto, was admitted in evidence at the trial; and the judge charged the jury that the plaintiff was only entitled to recover as damages the difference between this expense and the expense of removing to the farm the defendant agreed to let. The jury found a verdict for the plaintiff accordingly, and assessed the damages at fifty dollars. The plaintiff appealed.

Rexford and Kingsley, for the appellant.

Henry R. Mygatt, for the respondent.

By Court, WOODRUFF, J. No question appears to have been raised on the trial touching the liability of the defendant. Although it was alleged in the answer that the sale of the farm in question was by the consent of the plaintiff, and such consent is set up as a rescission of the contract declared upon, the proof obviously failed to establish such a rescission, and the case was properly treated as one in which, after the execution of the agreement, the defendant had voluntarily sold the farm and had broken his engagement with the plaintiff, and

had thereby subjected himself to the payment of whatever damages the defendant had sustained thereby, to be assessed according to such rule as the law prescribes.

Neither the industry of counsel, nor my own research, has discovered any adjudged case in which the rule of damages for the breach of such an agreement has been declared.

In ascertaining the rule, it may be material to determine what is the character of the agreement, and what relations would arise between the parties had it been carried out by mutual performance.

The words of the agreement express an undertaking by the defendant "to lease and to farm let" to the plaintiff the farm in question, known as the Gray farm, for the term of three years.

The further provisions show that the farm was to be stocked and furnished mainly by equal contribution of the parties, the plaintiff to wholly furnish some things, and to occupy and work the farm; the defendant to wholly supply and pay her other things, and to have the privilege of also working and improving the farm; and all the proceeds of the farm (over and above keeping the stock thereon, and the use of certain specified articles in the plaintiff's family) are "to be divided between the respective parties equally, share and share equal, both as to expenses and profits arising from said farm."

If this agreement is to be treated as an agreement for a lease, such as if carried into execution would create the relation of landlord and tenant, then some guide or principle governing the recovery of damages will be found in cases of the breach of agreements to lease.

If it is to be treated as a contract for work and labor, the compensation therefor to be made in the partial support of the family on the farm, and in the final division of the proceeds of the cultivation, then some analogy will be found in the cases which declare the rule of damages for a breach of contracts to employ for a definite term.

And if it shall appear to be an agreement of a mixed nature, containing some of the characteristics of both, the rule must be derived from general principles that may be in harmony, if possible, with both, or at least conformable to the law of contracts generally.

In *Jackson ex dem. Colden v. Brownell*, 1 Johns. 267, the permitting of two persons to reside on the farm for one year,

cultivate it, and divide the grain with other two, who held under a lease from the lessor of the plaintiff, and also resided thereon, was held a breach of the condition of a lease which forbade more than two families, or tenants, to "reside on, use, or occupy any part of the premises." And to the claim that the two persons so cultivating the farm were mere servants, and that their contract was a contract for labor and services, to be paid for out of the crops, Livingston, J., says: "The only question is, whether they were tenants or barely servants; each had every character of a tenant, and not of a mere laborer for the owner of the soil; they took under a contract for a year; they occupied the same house; they had an interest or estate in the land; they paid rent in grain; they might bring their own cattle on, and reap what they pleased from it for their exclusive benefit, except grain, which was to be divided."

In *Foote v. Colvin*, 3 Johns. 215 [3 Am. Dec. 478], where one Litchfield sowed fourteen acres of land, belonging to the plaintiff Foote, with rye, on an agreement that Foote should have one third of the crop, and Litchfield two thirds, to be divided upon the field, it was held that the two had a joint interest in the crop, and as such could maintain trespass against a wrong-doer who cut and carried it away; and to the argument that Foote's share on the division provided for was to be regarded as rent, and therefore as the property of the cropper as tenant until gathered and divided, Spencer, J., holding that the property was joint, says: "This seems best to promote the intentions of landlord and tenant; if the portion reserved for the landlord was to be considered as rent, and in which he was to have no interest until severance and delivery, it would put it in the power of tenants clandestinely to alienate the produce of the land to the injury of the person who had enabled them to raise the crop."

And in *Bradish v. Schenck*, 8 Johns. 151, where Schenck brought an action of trespass *quare clausum fregit* against Bradish for damage done to a crop, it was proved that one Curtis "took the land of the plaintiff, and planted it with corn upon shares." To the objection that the possession was in Curtis, as tenant, and the property in the crop was in him, it is said *per curiam*: "Letting land upon shares for a single crop is no lease of the land, and the owner alone must bring trespass for breaking the close. Schenck and Curtis were tenants in common of the corn," etc.

On the other hand, in *Stewart v. Doughty*, 9 Johns. 107,

where one Van Antwerp let a farm for six years to A. Stewart, the latter stipulating "to render, yield, and pay to Van Antwerp the one half of all the wheat, rye, corn, and other grain raised on the farm in each year, in the bushel, after deducting the seed," with the right reserved to each to terminate the arrangement on giving six months' notice, in an action of trespass by Stewart, Jr., claiming under A. Stewart, for breaking, entering, and carrying away the crop, against the defendants, who justified as servants of Van Antwerp, who had given the six months' notice, and A. Stewart had removed in compliance therewith,—it was held, Kent, C. J., giving the opinion, that the crop belonged to A. Stewart, as emblements, notwithstanding "the lease was determined, since while the crop was in the ground it was determined by the lessor"; that the sale of the crop while in the ground, before the notice to quit, as the property of A. Stewart, was a valid sale; that the whole property in the grain was in the lessee; that it being a lease for five years, by which Van Antwerp "rented and hired and suffered the lessee to possess and enjoy the farm, and gave him the quiet and uninterrupted possession," etc., an interest in the soil passed, and the lessee would have been entitled to an action of trespass for any unlawful entry upon it; that the proportion of the productions of the farm which the tenant was yearly to render was a payment of rent in kind; they were not tenants in common in the crops and productions raised; the interest and property in the crops was exclusively in the tenant until he had severed and delivered to the lessor his proportion. And accordingly the purchaser, having the exclusive interest in the crop, could maintain the action against the lessor for entering, cutting, and carrying away.

In *Overseers v. Overseers*, 14 Johns. 365, where it appeared that one Sweet lived and worked on a farm in Fort Ann in common with one Hotchkiss for about three years, the farm being worth about one hundred dollars a year, and that they held the farm on shares rendering half the produce to Mead, the owner, the court, holding that Sweet thereby gained a settlement in Fort Ann, place the decision on the ground that the transaction was "a *bona fide* renting and occupying as tenant . . . for two years, and actually paying such rent," within the statute which makes that the test in determining the place of settlement. "Hotchkiss and Sweet had the entire control and ostensible possession of the farm to sow and

plant according to their discretion for three years. The one half of the produce which they had a right to retain is not to be regarded as a mere rule of compensation for their labor; but the one half which they were to yield to the proprietor of the land ought to be considered as rent for the use of the farm."

Again, in *De Mott v. Hagerman*, 8 Cow. 220 [18 Am. Dec. 443], where, in an instrument under seal, dated April 1, 1824, "John De Mott agrees to let said Billson work a part of his farm," etc., "Billson to work such part as De Mott shall or may direct, to put all grain in in good order, to find all the seed, and out of the crop to deduct De Mott's one half, one half of seed so found; to deliver De Mott at his store one half of all the produce raised on said farm, etc.; said Billson to go on the farm as soon as convenient, and leave it on the first day of April next." It was held that "this was a letting of land upon shares, not a lease; and as to the grain raised, the plaintiffs were tenants in common."

If these six cases can be harmonized, it must be on the ground that three of them hold that such an arrangement as we are considering, when made in reference to a single crop, is not a lease, and the share reserved to the owner is not rent; but the others, that when the arrangement is for one or more years, the agreement of hiring is a lease, the whole property in the crop is in the cultivator as tenant, it may be sold as his sole property, and the owner of the land acquires no interest therein until it is secured and divided and delivered to him, then he takes it as rent. The use of the terms "let" or "lease," if that could be resorted to to ascertain when the parties intended to create the relation of landlord and tenant, will not harmonize these cases, because terms were employed in most or all of them which are apt to create a lease.

If these last-named cases were to govern the agreement now before us, we should be able to give it a specific character, and by referring to the rule of damages for a breach of an agreement to lease, possibly find some guide to the determination of the question raised by this appeal.

But subsequent cases have not followed those which held that the arrangement has the effect lastly mentioned.

In *Caswell v. Districh*, 15 Wend. 379, the agreement by the owner was, "to let Districh [the defendant] have his farm for one year," and Districh agreed to sow oats and give the owner

one third in the half-bushel; corn one third in the basket; wheat one third in the half-bushel, etc.

And the court say of this: "The agreement was a letting of the premises upon shares, and, technically speaking, it was not a lease," approving *Foote v. Colvin*, *Bradish v. Schenck*, and *De Mott v. Hagerman*, above referred to; although here the agreement was for a fixed term, like *Jackson v. Brownell*, 1 Johns. 267; holding also that the portion of the crops to be paid to the owner was not by way of rent, in which the property would be in the tenant until a division, but secured to the owner a property in the crop *ab initio*, and so made the two parties tenants in common.

The court intimate that the decision in *Stewart v. Doughty*, 9 Johns. 107, can be distinguished on the ground that there the phraseology of the instrument so corresponded with the terms usual in leases as to indicate that the portion of the crops was intended as payment of rent in kind, and hence the whole interest belonged to the tenant until division.

In *Putnam v. Wise*, 1 Hill, 234 [37 Am. Dec. 309], the relation created by such arrangements is very elaborately discussed. There the instrument was in form substantially like that in *Stewart v. Doughty*, *supra*. It was under seal; the owners "do by these presents lease and to farm let all said land to the parties of the second part," etc.; then followed particular details, as to the furnishing of seed, etc.; and the parties of the second part covenanted "to yield, pay, and give to the parties of the first part one half of all the grain raised and to be delivered at," etc.; with details as to the mode of cultivating, etc., the feeding of sheep supplied by the parties of the first part, division of the wool, and that the parties of the first part should have the land from the 1st of April, 1836, to 1st of April, 1837, and if they performed the agreement in a manner satisfactory to the owners, they should have it for another year on the same terms.

Mr. Justice Cowen, in giving the opinion of the court, reviews the previous cases, particularly *Stewart v. Doughty*, *supra*; regards *Caswell v. Districh*, *supra*, as in principle overruling it; repudiates any distinction founded on the employment of terms of "letting," "leasing," "rendering," etc., or on the difference between an agreement that is to continue for a single crop and one that is to continue for one or more years; and holds that the arrangement is, that the occupants or croppers shall come in rather as servants than tenants, taking an in-

terest in the crops and other products as compensation for their labor; the owners are compensated for the use of their land by a share of the crop, and the occupiers are compensated for their labor; that this makes them tenants in common of the crops and products, unless the terms of the contract (which might be without legal objection) are such as to secure to one or the other an exclusive interest in some or one of the particular crops or products. If division of products be contemplated, a tenancy in common arises in such as are to be divided. He refers to numerous cases, chiefly from New England, to the effect that the occupier, being a mere servant, cannot maintain trespass *quare clausum fregit*, but the owner only; that his possession is that of the owner; that he has no interest in the land that he can assign, and on his death the contract would be at an end.

This case was followed by our present supreme court, in *Dinehart v. Wilson*, 15 Barb. 595.

This later view of the subject is in conformity with the cases in Massachusetts, New Hampshire, and Maine: *Lewis v. Lyman*, 22 Pick. 437, and the cases therein referred to, being prominent. And a case furnishing a very close analogy is found in Connecticut: *Loomis v. Marshall*, 12 Conn. 69 [30 Am. Dec. 596]. See *Bennett v. Platt*, 9 Pick. 558; *Chandler v. Thurston*, 10 Id. 209; *Beaumont v. Crane*, 14 Mass. 400; *Melville v. Brown*, 15 Id. 82; *Dockhan v. Parker*, 9 Me. 137 [33 Am. Dec. 547]; *Kittridge v. Woods*, 3 N. H. 503 [14 Am. Dec. 393]; *Robertson v. George*, 7 Id. 306; *Bishop v. Doty*, 1 Vt. 37.

If the question were new, I should say unhesitatingly that each case ought to be chiefly governed by the language employed by the parties to express their intention. Nor do I perceive any legal objection to a stipulation in a lease for the payment of rent in wheat or other product of the land leased. In general, in a lease for years, or a grant in fee, reserving rent, when it is payable in specified articles, as a certain number of bushels of wheat, and so many fowls, etc., it is entirely clear that the parties expect that the payment will be out of the product of the farm. Nor would the reservation be any less rent, in my apprehension, if the reservation were in terms "rendering, delivering, and paying so many bushels of wheat out of, or parcel of, the wheat raised on the farm."

Parties are certainly at liberty to define and establish their legal relations by the use of terms legally appropriate to the

object; and it is not clear to my mind that courts should not give effect thereto, according to their understood legal meaning. Hence when A agrees with B that he will employ B, with his team, etc., upon his farm, whether for one year or five, leaving B at liberty to cultivate such fields, and plant such crops as he shall see fit, with just regard to what good husbandry requires, and to pay B, for his work, labor, and services, one half of the crops raised, it is obvious that the parties intend an agreement for work, labor, and services, to be paid for by A in a share of the results.

On the other hand, if A should demise, lease, and let the farm to B, to have and to hold for the term of one or five years, to be cultivated in a husband-like manner, rendering and paying to A an annual rent for the use of the farm, to wit, one half of the crops raised, I perceive no sensible reason why the parties should not be deemed to intend an actual and technical lease, which would entitle the lessee to possession, give him a term in the land, make his payment rent in the technical sense. It may well be inferred from this language, contradistinguished from the other, that here it was intended that the tenant should have exclusive possession and the whole ownership for the term, subject only to his duty to pay the rent as it accrued. While in the other case it would be equally plain that the owner did not intend to divest himself of possession or of title to the crops, but to come under an obligation and duty to compensate for the services by paying therefor out of and according to the quantity of the products. In each case, the result at the end of the term, if both performed, would be precisely the same; and yet it may be deemed by parties contemplating such arrangements with an owner of land, very important to their security that they should have all the rights of tenants, and when they obtain an instrument in the form of a lease, in very terms, giving them a term, and reserving rent as such, there would seem to me no legal reason for saying the parties did not intend just what such terms express. And therefore, when, upon the instrument itself, the parties have, in legal language, created a term in the land, it should, in accordance with the view expressed by Kent, C. J., in *Stewart v. Doughty*, *supra*, be permitted to operate accordingly. But, on the other hand, where the terms employed indicate a hiring of person and team, etc., and an intent that the owner hold the title and possession of the land,

and make compensation out of the product, let it operate accordingly.

The mere circumstance that the pecuniary result of complete performance would be identical is not a conclusive test of the intention of the parties. The intermediate and different incidental legal consequences of the two instruments may have been the great motive to the difference in their form, and presumptively have controlled the parties in their form. And if a tenant will only commit himself to such an enterprise for a term of years, on condition that he shall have a legal estate in the land for the term, and that the owner of the fee shall look to the conditions of the lease and his covenants for his compensation for the use of the land as rent; and being of such mind, he obtains from the owner an instrument in legal and apt terms to express that result,—why should not the instrument so operate? It is not a sufficient reason for denying such legal effect that another agreement, which is otherwise expressed, imports an intention to hire and pay for the work and labor.

Notwithstanding these suggestions, the balance of the authorities above cited seems to be that, notwithstanding the technical terms employed, such an agreement does not amount to a technical lease; that the relation of landlord and tenant is not contemplated, and the portion of the crops reserved to the owner is not rent, but compensation for the use of the land, while the other portion is compensation to the occupier for his work, labor, and services, etc.; and that the legal possession of the land is in the owner, and the two are tenants in common of the crop.

If this view be taken of the nature and intent of the agreement before us, what is the rule of damages for its breach?

It is settled that if there be an agreement to employ for a specified term, and at a specified compensation, and the employer refuses to perform, he is liable to pay as damages the stipulated compensation for the full period, provided the proposed employee remains out of employment and in readiness to serve during the whole period. But although he is *prima facie* entitled to the whole compensation, it is competent for the defendant to reduce the recovery by showing that the plaintiff earned something in other ways during the period; and it is said that such reduction may be insisted upon on proof by the defendant that the plaintiff had the opportunity to accept other employment of the same kind, in the same locality, and

refused: Sedgwick on Damages, 2d ed., 352, c. 12; *Costigan v. Mohawk etc. R. R. Co.*, 2 Denio, 609 [43 Am. Dec. 758], and cases cited; *Heim v. Wolf*, 1 E. D. Smith, 73.

But it is quite obvious that if such be the rule, the party suing to recover his wages must wait until wages are due before he can recover them, and he can recover no more than have accrued. That is to say, the plaintiff can recover no more nor any faster than he would be entitled to receive if he had been employed. The employer will not be bound to pay the plaintiff for being idle more than he would pay him for rendering the service, and wages will accrue no faster to the plaintiff while idle than while employed, and therefore prospective wages cannot be recovered.

Can the rule of damages in such case be varied by declaring, not for wages as such, but for damages for denying to the plaintiff the opportunity to earn the wages? Doubtless the cause of action may be so dealt with, but that will not entitle the plaintiff to the stipulated compensation not yet accrued. *Non constat* whether the plaintiff may not in the future have employment which will be even more remunerative, and the plaintiff, by bringing his action immediately upon the refusal to employ, cannot practically deprive the defendant of the benefit of his reclamation or abatement for earnings which may be subsequently received from other sources. If the action be brought immediately, the plaintiff will, of course, be entitled to nominal damages, and it may be, under some circumstances, to special damages. But if he claims as damages the loss of the stipulated wages, he must wait until, but for the breach, he would have received them.

This is not, however, because he is not entitled to the benefit of his contract,—not because the whole value of the contract may not be recovered in a single action and immediately upon the refusal of the defendant to perform,—but because the whole wages do not represent the value of the contract; presumptively the services which he does not render, and which he can turn to other account, are worth as much as the wages, and therefore so long as it is uncertain whether he will have other employment, it is impossible to tell what he has lost by the defendant's fault.

Now, if the contract which we have before us was an agreement for a lease, the rule of damages usually applied to such agreements is the difference between the rent the tenant agrees to pay, and the annual value of the term; and special dam-

ages may be awarded also for expenses necessarily incurred, which, by reason of the disappointment, are lost: *Driggs v. Doughty*, 17 Wend. 71; *Giles v. O'Toole*, 4 Barb. 261; *Lawrence v. Wardwell*, 6 Id. 424.

But the conclusion above arrived at is, that under the authorities we cannot treat the present contract as an agreement for a lease, properly or technically so called.

And it has been seen that if the agreement be regarded as an agreement for services, the recovery would be the stipulated compensation up to the time of suit brought, subject to the right of the defendant to show earnings, or at least a refusal to earn during the same period, or a portion thereof.

Obviously, if the rule of damages applicable to a mere hiring of services were to be applied to this case, the plaintiff, having brought his action immediately after the breach, could not claim, upon any facts proved, that anything in the nature of wages or compensation had accrued or would have then accrued to him, had the contract been performed.

Besides, he was not, except in a remote sense, a servant. He would have sowed, and planted, and cultivated at his entire discretion, subject only to the rules of good husbandry. He would have supplied a portion of the seed; he would have found food, shelter, and maintenance for stock furnished by himself, the growth and produce of which would have been his own; he would have become himself the employer of servants, out of whose labor he had the chance of profit; he would have had a home for his family, and a portion of the supplies for their use; and finally, his settlement would have been in the nature of an accounting and distribution of the stock and profits. This, it is true, did not create a partnership, in the usual sense of that word, and if it did not create the relation of landlord and tenant, it was certainly not a hiring upon wages, the benefit of which could only be derived from performance, or from being out of employment.

In my judgment, we are not driven to the alternative of regarding the present agreement as either the one or the other, but as a special contract, partaking of some of the characteristics of both.

According to the above later cases, it is not a lease, nor an agreement for a lease, and the plaintiff would not have become a tenant; and yet he was not, and would not if he had entered into possession have become, the mere servant of the owner. Indeed, in *Walker v. Fitts*, 24 Pick. 191, in the su-

preme court of Massachusetts, where it is so uniformly held that the occupier does not own the crops, as tenant, rendering to the owner a portion as rent, but the two are tenants in common, Justice Morton says: "The occupier is not a mere servant; it is not a contract of hire in which he receives compensation for services. It is not a mere license to enter and cultivate, nor a tenancy at will." Yet he says: "He had a right to occupy, and an interest in the land. The owner could not exclude him, nor maintain an action against him for anything done in pursuance of the agreement."

In view of these observations, and in view also of the decisions above referred to, the learned justice did very pertinently add: "What the precise nature and character of his interest was, is not so easily determined."

It was, in view of the decisions, a special contract, partaking somewhat of the nature of an adventure, and entitling the party to the chance of profit or benefit derivable therefrom. On an agreement for wages, the court can declare, as matter of law, that if the party serve he is entitled to the stipulated compensation. If the amount be not fixed in the contract, then what his services are worth; if he finds other employment, they may be allowed in abatement.

Here the court cannot say that, if the contract had been performed, he would have realized one dollar for his services; *non constat* that the returns of the cultivation would have equaled his expenditure. It may be presumed that the earth will yield a reward to the husbandman; but how large? That depends upon details more or less contingent and speculative. And other contracts of the same nature, in the same place, calling for the same expenditure of time, labor, skill, assistance, and other details, and upon a farm of the same precise character, may safely be said to be impossible.

To my mind, the only rule which can be prescribed, and the only rule which will do justice to the parties, is, that the plaintiff is entitled to the value of his contract. He was entitled to its performance; it is broken; he is deprived of his adventure; what was this opportunity which the contract had apparently secured to him worth? To reap the benefit of it, he must incur expense, submit to labor, and appropriation of his stock. His damages are what he lost by being deprived of his chance of profit.

How, then, can the value of the contract be proved? If it cannot be proved, then the plaintiff can only recover nominal

damages. I think the plaintiff is not without a better rule. The administration of justice frequently proceeds with reasonable certainty of accomplishing what is right, or as nearly right as human efforts may attain, in the face of similar difficulties, and it does so by making the experience of mankind, or rather, the judgment which is founded upon such experience, the guide.

Like the question of the market value of goods on a particular day, that becomes a test of damages only, as a means of judging how much one entitled thereto could have realized by a sale, and yet numerous contingencies might have rendered it impossible to sell at that price, and other circumstances might render it grossly improbable that, if he had the goods, he would have sold them at that time; so, when the damages for not executing a lease of a house are to be ascertained by proving the value of the lease at the rent reserved; and other cases are numerous in which such value must be ascertained by resort to the judgment of men whose knowledge of the premises, and whose experience in the same or like matters, enable them to form a judgment on the subject.

It is quite true that any opinion so expressed will be open to scrutiny; cross-examination may draw out all the grounds of opinion, and may travel over all the causes of uncertainty and doubt above alluded to, even to the estimate in detail of all the possible results of working the farm, and its expenses and contingencies.

It is also true that any such opinion must be formed in view of all the various uncertainties attending the operation of working the farm, but it is a result based upon years of experience and observation with knowledge of the farm itself, upon which the plaintiff must rely to prove the value of his contract. How much is such a privilege (whether it be called a lease or right of occupation, or by whatever name) worth? Any answer to that question necessarily brings into the mind of any one proposing to buy the privilege all that it will cost him in time, labor, money, or other sacrifice to enter upon performance and perform the contract on his part, and also all the uncertainty as to the result in producing value to him in return. Such a privilege may be worth nothing. It may be worth more than the labor and expense attending it. I think it is a proper subject for proof in that form.

According to these views, the question whether or not the

plaintiff hired another farm, and what it cost to remove to it, becomes irrelevant.

For these reasons, I think the judgment should be reversed, and a new trial ordered, costs to abide the event.

Judgment reversed.

AGREEMENTS TO WORK LAND ON SHARES, and rights of respective parties in the land and in the crops: See *Bernal v. Hovious*, 79 Am. Dec. 147, and cases collected in note 151; *Dixon v. Niccolls*, 89 Id. 319, and note.

AGREEMENT TO FARM LAND ON SHARES IS CONTRACT OF SERVICE, and not of lease, and the person doing the farming is a mere cropper, and not a tenant, and has no interest in the land: *Adams v. McKesson*, 91 Am. Dec. 183.

THE PRINCIPAL CASE IS CITED to the point that the market value of goods on a particular day, and the value of a lease, are to be ascertained by the judgment of men whose knowledge, and whose experience in the same or like matters, enable them to form a judgment on the subject, in *Washburn v. Hubbard*, 6 Lans. 14; it is cited and followed to the point relative to the kind of evidence admissible to show loss of profits, in *Day v. New York Cent. R. R. Co.*, 22 Hun, 417; to the point that an agreement to allow one to work land on shares for a single crop is no lease of the land, but the parties to such an agreement become tenants in common of the crop, in *Decker v. Decker*, 17 Id. 14; *Thomas v. Bacon*, 34 Id. 90; *Vaughn v. De Wandler*, 63 How. Pr. 380; to the true test to be applied to agreements in which the rent is to be paid in shares, in *Strain v. Gardner*, 61 Wis. 181. It is cited to the second point stated in the syllabus, and distinguished, in *Howard v. Daly*, 61 N. Y. 372; and is criticised as to the rule of damages in *Cummings v. Hansen*, 63 How. Pr. 352. It is followed in *Reed v. McConnell*, 17 N. Y. Week. Dig. 575, as to the proof of damages, by the estimates of witnesses; but on this point is dissented from in *Wakeman v. Wheeler etc. Mfg. Co.*, 101 N. Y. 218.

MEASURE OF DAMAGES RECOVERABLE BY LESSEE WHO IS PREVENTED FROM TAKING POSSESSION, OR IS AFTERWARDS EVICTED BY LESSOR. — The doctrine has been sometimes maintained, chiefly upon the authority of *Fleureau v. Thornhill*, 2 W. Black. 1078, that a lessor who fails to give possession to his lessee, or who evicts him afterwards, is ordinarily only liable in nominal damages for his breach of contract: See Taylor's Landlord and Tenant, 7th ed., sec. 317; Wood's Landlord and Tenant, sec. 365; 3 Sutherland on Damages, 147; *Kinney v. Watts*, 14 Wend. 38; *Moak v. Johnson*, 1 Hill, 99; *Kelly v. Dutch Church*, 2 Id. 105; *Mack v. Patchin*, 42 N. Y. 167, 171; S. C., 1 Am. Rep. 506, 507; *McClowry v. Cloghan's Adm'r*, 1 Grant Cas. 307; *McCafferty v. Griswold*, 99 Pa. St. 270. The general rule for the measure of damages, in case of the lessor's refusal or failure to deliver possession of the demised premises, is, however, the loss of the bargain to the vendee: *Robinson v. Harman*, 1 Ex. 850; *Lock v. Furze*, L. R. 1 C. P. 441, affirming 19 Com. B., N. S., 96; *Snodgrass v. Reynolds*, 79 Ala. 452; S. C., 58 Am. Rep. 601; *Culley v. Hawkins*, 48 Ill. 308; *Mack v. Patchin*, 42 N. Y. 167, 172; S. C., 1 Am. Rep. 506, 508; *Van Brocklin v. Corporation of Brantford*, 20 U. C. Q. B. 347; or in other words, the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term: Taylor's Landlord and Tenant, 7th ed., sec. 317; Wood's Landlord and Tenant, sec. 365; 3 Sutherland on Damages, 149; *Rose v. Wynn*, 42 Ark. 257; *Green v. Williams*, 45 Ill. 206; *Dobbins v. Duquid*, 65 Id. 464; *Adair v. Bogle*,

20 Iowa, 238; *Alexander v. Bishop*, 59 Id. 572, 578; *Hughes v. Hood*, 50 Mo. 350; *Dean v. Roessler*, 1 Hilt. 420; *Giles v. O'Toole*, 4 Barb. 261; *Trull v. Granger*, 8 N. Y. 115; *Newbrough v. Walker*, 8 Gratt. 16; *Poposkey v. Munkwitz*, 68 Wis. 322; *Cole v. King*, 19 Week. Dig. 551. So in an action to recover damages for the breach of a contract by which the defendant engaged to employ the plaintiff to cultivate a farm upon shares, the proper measure of damages is the profit which the plaintiff would have made on the farm if the contract had not been violated: *Hoy v. Grenoble*, 34 Pa. St. 9. If a lessor refuses to deliver the whole of the premises, and the lessee enters into possession of part, the measure of damages is the diminished value of the lease: *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501. Where a lessor covenanted to renew at the same rent, but compelled the lessee to take a renewal at an increased rent, the measure of damages is the difference between what the lessee was to have paid and what he was compelled to pay under the new lease: *Tracy v. Albany Exchange Co.*, 7 N. Y. 472, 475.

If other damages have resulted to the lessee as the direct and natural consequence of the lessor's breach of the contract, these are also recoverable: *Rose v. Wynn*, 42 Ark. 257; *Green v. Williams*, 45 Ill. 206; *Williams v. Oliphant*, 3 Ind. 271; *Adair v. Bogle*, 20 Iowa, 238; *Lawrence v. Wardwell*, 6 Barb. 424; *De la Zerda v. Korn*, 25 Tex. Supp. 188; as expenses incurred in preparing to remove to and occupy the premises: *Driggs v. Dwight*, 17 Wend. 71; S. C., 31 Am. Dec. 283; *Giles v. O'Toole*, 4 Barb. 261; *Woodbury v. Jones*, 44 N. H. 206; *Adair v. Bogle*, 20 Iowa, 238; or in otherwise preparing to carry out the agreement: *Cilley v. Hawkins*, 48 Ill. 306; loss of time, trouble, and inconvenience the natural consequences of the breach: *Yeager v. Weaver*, 64 Pa. St. 425; *Adair v. Bogle*, 20 Iowa, 238; but not probable loss of profits: *Green v. Williams*, 45 Ill. 206; *Alexander v. Bishop*, 59 Iowa, 572, 578; *Giles v. O'Toole*, 4 Barb. 261; *Newbrough v. Walker*, 8 Gratt. 16; although damages for loss to business which could not possibly be avoided may be recovered: *Dobbins v. Duquid*, 65 Ill. 464; and where the lessee's business was unavoidably suspended in consequence of the lessor's refusal to deliver possession, the lessee was held entitled to recover interest, during such suspension, on the capital actually invested: *Green v. Williams*, 45 Id. 206. Whatever is offered in mitigation of damages must also have a proximate relation to the contract: *Wolf v. Studebaker*, 65 Pa. St. 459.

In case of an eviction by the lessor, the general rule also is, that the lessee is entitled to recover the difference between the rent he was to pay and the actual value of the unexpired term: *Wood's Landlord and Tenant*, sec. 365; 3 *Sutherland on Damages*, 149; *Williams v. Burrell*, 1 Com. B. 402; *Chatterton v. Fox*, 5 Duer, 64; *Schlemmer v. North*, 32 Mo. 206; but see *Smith v. Wunderlich*, 70 Ill. 426; as well as such other damages as are the natural consequences of the eviction: *Wood's Landlord and Tenant*, sec. 365; *Ashley v. Warner*, 11 Gray, 43; *Chapman v. Kirby*, 49 Ill. 211; but the damages are only such as can be ascertained and fixed with reasonable certainty: *New York Academy of Music v. Hackett*, 2 Hilt. 217. Loss of profits which the tenant might have made had he not been disturbed cannot be recovered: *Denison v. Ford*, 10 Daly, 412; yet where they are the natural and proximate consequence of the eviction, it is otherwise: *Shaw v. Hoffman*, 25 Mich. 162; and see *Marquart v. La Forge*, 5 Duer, 559. Exemplary damages are also recoverable: *Smith v. Wunderlich*, 70 Ill. 426.

SCRANTON v. CLARK.

[89 NEW YORK, 220.]

WHERE VENDOR OF CHATTEL IS NOT IN POSSESSION AT TIME OF SALE, WARRANTY OF TITLE IS NOT IMPLIED, and his subsequent acquisition of a good title will not inure to the benefit of the vendee. But where the vendor is, at the time, in the possession of the thing sold, he is held to an implied warranty of title.

ACTION upon a promissory note. The note was made October 16, 1855, by the defendant Clark, payable to the order of E. B. Litchfield, one year after date; and the payee transferred the note, before its maturity, to Jerome, indorsing it without recourse. In December, 1857, Jerome transferred the note to E. C. Litchfield, who retained possession of it until August, 1860, and then transferred it back again to Jerome. In a few weeks after the last-mentioned transfer, Jerome sold, transferred, and delivered the note to E. B. Litchfield, who transferred and delivered it to the plaintiffs, who brought suit thereon in September, 1860. The defense was payment, alleged to have been made to one Leland in the fall of 1858. In that year Leland agreed with Jerome to exchange some wild western lands for certain overdue notes, which agreement was carried into effect, and it was supposed that the note in question was included in the agreement; but in fact the note was never in the possession of Leland, and the defendant knew it was not in his possession at the time he claims to have paid it. But Leland left other notes bought in the land transaction with Jerome, and took them away as he had occasion to use them, and he gave the defendant an order on Jerome for the note in suit. On presenting this order, Jerome supposed from the defendant's statements that this note was one of those which he sold to Leland, and signed a paper admitting it, under that impression. The jury were charged,—
“1. That if Jerome was the owner of the note in 1858, when it was said he sold it to Leland, and he did so sell it, but did not deliver it, then the note is paid, and the plaintiffs cannot recover; 2. That if Jerome was not the owner of the note in 1858, at the time he is said to have sold it to Leland, and he did so sell it, and he afterward became the owner of it, then if Clark had paid it to Leland, who had purchased it, the plaintiff cannot recover, because Jerome must be deemed to have warranted the title, and if he acquired the title after a sale to Leland, it then became extinguished by opera-

tion of law." To the last proposition the plaintiffs' counsel excepted. The verdict was for the defendant, and judgment was entered thereon. Upon appeal, the general term reversed said judgment and ordered a new trial, and the defendant appealed.

Chatfield, for the appellant.

Emott, for the respondents.

By Court, BACON, J. If the charge of the learned judge upon the trial had stopped at the first proposition enunciated by him, it is possible the verdict might be upheld, because it may perhaps be said that there is some evidence from which the jury might possibly have found that Jerome was the owner of the note in 1858, when it is claimed that he sold it to Leland. The uncontradicted, and indeed overwhelming, evidence is, that in December, 1857, the note in controversy was sold and delivered to Edwin C. Litchfield, who held it as owner from that time until August or September, 1860, when he sold and transferred it to Jerome, who soon after disposed of it to Elisha B. Litchfield, from whom the plaintiffs derive their title. It is quite likely that in the transaction between Jerome and Leland, which occurred in the fall of 1858, both parties supposed that this note was among the bundle of securities that were traded off for the wild land, but it is as nearly certain as it can well be rendered by testimony that Jerome had not then either the possession or ownership of the note, and it can hardly be claimed that the jury, if that naked proposition had been left to them upon the testimony, could have found any such fact. The utmost that can be insisted the testimony conduces to prove is, it seems to me, that Jerome agreed to sell this note, with others, in exchange for the lands; that the other notes were handed to the clerk of Jerome, or to Jerome himself, who held them as the depository of Leland, but that this note was not among the number, and was never in the possession of Leland, or that of his agent.

Assuming this to be the state of the case, the jury were instructed that, if they believed that Jerome sold, that is, in effect agreed to sell, this note to Leland, although he was not the owner at the time of this agreement, yet, as he afterward became the owner, his agreement implied a warranty of title, and this subsequently acquired title inured to the benefit of Leland, his vendee, and payment to him extinguished the

note. Upon this proposition the jury were authorized to find, as they did, a verdict for the defendant; and the question is, whether the proposition is sound in law; in other words, is there an implied warranty of title in the sale of a chattel where the owner is not in possession?

It is to be assumed that there was no express affirmation of title by Jerome to Leland. There was, on the one hand, a sale of wild lands, and on the other, a sale and transfer by delivering of certain notes, and an agreement to sell another note, but of which no assignment or delivery was made, and no written transfer executed purporting to convey a present interest, or one *in futuro*.

On this precise question, as to the implication of a warranty on the sale of a chattel not in possession of the vendor at the time, Chancellor Kent, in his Commentaries, states the doctrine, without qualification, to be, that the rule of *caveat emptor* applies, and the party buys at his peril: 2 Kent's Com. 478. He adds that if the seller has possession of the article, and sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title. In support of the rule, as thus stated, he cites two or three old cases in the English books. The first is, the remark of Tanfield, chief baron, in *Roswell v. Vaughan*, Cro. Jac. 197, to the effect that if one sell lands, whereof another is in possession, or a horse, whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys, and it is not reason that he should have an action at the law, where he did not provide for himself. In *Medina v. Stoughton*, 1 Salk. 219, Holt, C. J., decided that, where one having possession of a chattel sells it, the affirmation that it is his amounts to a warranty, but, *aliter*, where the seller is out of possession, for there may be room to question the seller's title, and *caveat emptor* in such case, to have either an express warranty or a good title. These cases seem to have settled the law in England, in conformity with the principle laid down by Kent, and we have been cited to no authority doubting or questioning them, unless such an inference may arise from the remark of Buller, in *Paisley v. Freeman*, 3 Term Rep. 58, which, however, is merely to the effect that if the seller affirms the chattel, not in his possession, to be his, he is bound to answer for the title; for, in such case, the vendee has nothing else to rely upon. This places the liability upon the ground of an affirmation, amounting to a warranty, and is not at all

inconsistent with the principle enunciated in the two cases on which the rule, as stated by Kent, is founded.

In this state the same question was presented, and is very fully discussed, both on principle and authority, in the case of *McCoy v. Archer*, 3 Barb. 323. The effect upon the question of warranty of title upon a sale, where the property is in or out of the possession of the vendor, is there considered, and the propositions are established that possession by a vendor of chattels is equivalent to an affirmation of title, and, in such case, the vendor is held to an implied warranty of title, even although nothing be said on the subject between the parties. But if the property sold be at the time of the sale in the possession of a third party, and there be no affirmation or assertion of ownership, no warranty of title will be implied. In these circumstances, in order to attach any liability to the vendor upon a sale, there must be an affirmation, which will amount to a warranty of the title.

The principle established by this case is followed and approved in *Edick v. Crim*, 10 Barb. 445, where the court cite the case in Cro. Jac. 197, and say the general rule is, that the vendor of a chattel impliedly warrants the title, yet when the chattel is not in the vendor's possession, but in that of another, this rule does not prevail. In *Hopkins v. Grinnell*, 28 Id. 533, where the same point arose, the decision was to the same effect, and the proposition in the terms laid down by Kent was reiterated and approved.

It is not important to cite authorities from other states, several of which are quoted in the opinion of the court in the case of *McCoy v. Archer*, *supra*, and are to the same effect. These cases, in our own courts, settle the doctrine with us, from which there has been no dissent from the earliest case to the present time. The effect of these decisions is sought to be evaded by the assertion of the defendants' counsel, that, in these cases, the vendor never had possession of the thing sold, either before or after the sale, while here Jerome not only had possession before he sold, but afterward. It is not perceived how this fact, conceding it to exist, can vary the principle. The counsel, in this part of his argument, also insists that Jerome was the owner, and had possession of the note when he sold. If this were conceded, the argument would be at an end, and the proposition of law we have been discussing would be immaterial, but it is to be remarked that the weight of evidence is entirely otherwise, and in the proposition laid

down by the court in this case, the judge assumes that Jerome was not the owner of the note at the time of the alleged sale (as he undoubtedly was not in fact), but that it was his subsequent acquisition of the title that inured to the benefit of the vendee, so that he could hold the vendor upon an implied warranty, which, as we have seen, the law does not create, but expressly repudiates. In the case of *McCoy v. Archer, supra*, the note, which was the subject of the sale, was potentially in the possession of the defendants, being held by an agent for their benefit, some time prior to the transaction, by which they were sought to be charged.

It is said by the defendants' counsel that the certificate of Jerome to Clark estops him from making any claim on the note against Clark, and this estoppel follows the note into the hands of those deriving title from or through Jerome. It is quite questionable whether this certificate was properly admitted in evidence, the effect being, if it had any, to impeach the title to a chose in action in the hands of another party, after Jerome had parted with it. But it could not operate as an estoppel, for the simple and obvious reason that it was given long after the time that Clark had dealt with Jerome, and had professedly bought the note, and he was induced to no action whatever upon the strength of that certificate, or of any representation made in it. It lacks all the elements of a legal or equitable estoppel, and should properly have had no influence in the case.

I think the judgment of the general term should be affirmed, and judgment in accordance with the stipulation rendered for the plaintiffs for the amount of the note and interest, with costs.

All the judges concurred, except MASON, J.

Judgment affirmed.

RULE OF CAVEAT EMPTOR APPLIES TO EVERY SALE OF CHATTELS where the possession at the time of the sale is not in the person selling, if there is no express warranty of title; but where the possession is in the party selling, and he sells the chattel as his own, and for a fair price, the law implies a warranty of title: *Long v. Hickingbottom*, 64 Am. Dec. 118; *Scott v. Hix*, 62 Id. 459, and note.

WHEN SELLER WILL BE HELD TO WARRANT TITLE: *Costigan v. Hawkins*, 94 Am. Dec. 583, and note 588.

ACTION ON IMPLIED WARRANTY OF TITLE: See *Brown v. Pierce*, 93 Am. Dec. 57; *Fawcett v. Osborn*, 83 Id. 278.

THE PRINCIPAL CASE IS CITED to the point that on a sale of personal property by a person in possession a warranty of title is implied, in *Sheppard v. Earles*, 13 Hun, 653; *Reed v. Gannon*, 3 Daly, 419; *Ledwith v. McKim*, 3 Jones & S. 306; and to the point that the rule is otherwise when a vendor sells chattels not in his possession, in *Atkins v. Hosley*, 3 Thomp. & C. 323; *Mills v. Porter*, 5 Id. 65.

WINSTED BANK v. WEBB.

[39 NEW YORK, 323.]

COMPLAINT SUFFICIENTLY STATES CAUSE OF ACTION, although after setting out certain valid notes it states that they were surrendered and canceled, the defendant giving in lieu thereof certain other notes of the like amount, in which usurious interest was reserved for an extension of the time of payment; and the plaintiff is entitled to recover the amount actually due upon the valid notes.

DEBTOR DOES NOT SATISFY HIS DEBT BY GIVING HIS OWN NOTES, payable at a future day. If the new notes are not paid, whether valid or usurious, the creditor may proceed upon and recover for the original indebtedness, as if such notes had not been given, surrendering them on the trial.

USURIOUS EXTENSION OF TIME OF PAYMENT of valid debt does not impair the creditor's right to recover therefor. The surrender and cancellation of a security will not operate as a bar to a recovery, unless the intent of the transaction was to release or discharge the indebtedness.

ACTION to recover the amount due upon six promissory notes. The said notes had been canceled and surrendered by the plaintiff to the defendants, the plaintiff taking in lieu thereof six other promissory notes of the like amount, in which was included a rate of interest admitted by the plaintiff to be usurious. Other facts appear in the opinion. The defendants' motion for a nonsuit was granted, and judgment of nonsuit was directed. The nonsuit was set aside at general term, and a new trial ordered. The defendants stipulated and appealed.

John H. Reynolds, for the appellants.

Samuel Hand, for the respondent.

By Court, WOODRUFF, J. The nonsuit having been granted in this case upon the plaintiff's opening, the facts stated in the complaint must be taken to be true as alleged, nothing having been conceded in such opening inconsistent with the allegations in the complaint, but, on the contrary, the statement upon which the nonsuit was ordered having, in substance, reiterated them.

It is perfectly settled that the right to sustain the action upon the facts alleged does not depend upon the prayer for

judgment. Any relief to which, upon the facts alleged, the plaintiff is entitled, the court should grant, when the defendant has appeared and answered: Code, sec. 275; *Emery v. Pease*, 20 N. Y. 62; *Marquat v. Marquat*, 12 Id. 341.

The complaint shows that the plaintiff, as indorsee, held six promissory notes of \$2,000 each, made by the defendants, which were due and payable, and had been protested for non-payment, and the whole principal and interest from their respective maturity was due to the plaintiff; that as an extension of the time of payment, the defendants gave to the plaintiff, for the same debt, other six notes for \$2,000 each, and paid \$426, and the plaintiff delivered to the defendants the first six notes. The six notes last delivered as such extension of the time of payment had become payable before the action is brought, and have also been protested for non-payment.

Upon these facts, it is clear that a sum of money, to wit, the amount of \$12,000 (besides interest), less the \$426, is due to the plaintiff from the defendants. It became payable at the maturity of the first six notes. The time for payment was extended in part (whether by a binding contract or not) until the maturity of other six notes, but the debt has not been paid. *Prima facie*, the last six notes are instruments, by force of which the plaintiff is entitled to recover; but it is not alone by force of those notes that such right of recovery exists; the primary cause and consideration of the indebtedness of which those notes are evidence has not been satisfied. The original evidence of the debt was surrendered, and other notes substituted, but the consideration of the latter is simply the indebtedness which formed a complete ground of indebtedness before they were given.

It is not essential that the plaintiff should determine by allegation whether it is by force of the first six notes, or by force of the second six, that he makes his claim. If, upon the whole transaction stated in the complaint, it is clear that the plaintiff is entitled to have of the defendants a sum of money specified, there is a cause of action.

Although the counsel for the appellants has argued with great ingenuity and skill in support of the nonsuit, and has insisted that the complaint does not state facts sufficient to constitute a cause of action, yet his first subordinate proposition is, that the complaint "sets out a good cause of action on the last notes." And the alleged defect therefore lies in the

supposed fact that "the action is brought on as well as to recover the amount of the first six notes."

It would seem to be enough to say that the concession that the complaint sets out a cause of action on the last notes disposes of the point.

The fallacy of the reasoning is, that it assumes that the action is necessarily to be regarded as brought upon either set of notes, to the exclusion of any reference to the others. The action is to recover the debt; the amount of the first six notes is the measure of the indebtedness. The notes successively have been given as evidence of the indebtedness.

It follows that so long as nothing appeared in the case except what the complaint alleged, there was a plain right to recover just what the plaintiff claimed to recover. In that view, the complaint may have contained matter which was wholly unnecessary,—and the statement that the defendants alleged and claimed that the last notes were usurious may have been unnecessary, but the substantial fact appeared that the defendants were indebted to the plaintiff in the amount of certain six notes, on the surrender of which they had given to the plaintiff six other notes which were not paid.

What, then, was there in the opening statement by the counsel for the plaintiff in addition to the facts averred in the complaint? Simply this: an admission that the last six notes were usurious, and therefore void.

What is the legal effect of that admission? So long as it is law that the giving of a usurious security for a valid debt does not destroy the debt or the right to recover therefor, the only effect of the admission was to show that the plaintiff could not recover by force of the last six notes; that the promise contained therein could not be enforced; and therefore, that if the plaintiff could recover at all, it must be for the valid indebtedness which subsisted when those six notes were given.

The argument of the appellants upon which alone the non-suit proceeded is: Although the defendants were indebted to the plaintiff December, 1857, in the sum of twelve thousand dollars and upward, there can be no recovery therefor, because the six notes, which constituted the ground and evidence of that indebtedness, were surrendered and canceled, and other notes taken for the same debt. There can be no recovery on the last notes, because they are usurious and void.

This reasoning overlooks two familiar rules: 1. That a debtor,

by giving his own notes, payable at a future day, does not satisfy his debt. If the new notes are not paid (whether valid or invalid), the creditor may proceed upon and recover for the original indebtedness as if such notes had not been given; surrendering such notes on the trial. In such case, he is none the less entitled, because he states in the complaint the facts constituting the original cause of action, and that such notes were given and not paid. 2. It overlooks the principle that a usurious extension of the time of payment of a valid debt does not impair the creditor's right to recover therefor. This is illustrated by the familiar practice, under our former technical rules of pleading, of declaring as for several causes of action in separate counts, when in truth but one existed; and when usury in the contract of extension appeared, obtaining a recovery for the original cause upon the count in which it was described.

But it is said that the first notes, being confessedly surrendered and canceled, that operated as a final bar to any recovery upon them, or for the consideration thereof. This is unsound. The surrender and cancellation of a note may or may not operate as a bar to such recovery. That depends upon the intent of the transaction, and the consideration upon which it is done. The complaint and the opening statement here not only show no intent to release or discharge the indebtedness, but that the whole purpose was to continue its existence and recognition with a new substituted evidence of the defendants' liability therefor.

To the suggestion that the usurer cannot set up his own usury as the ground of abandoning any claim to recover upon the last six notes, and recurring to the original debt, the answer is twofold,—1. Whether the last six notes were usurious or not, the plaintiff had the right, when payment thereof was refused, to recur to the original indebtedness; 2. It is the defendants that avail themselves of the fact of usury. The plaintiff admits, it is true, that the usury alleged in the answer of the defendants existed, but the plaintiff's cause of action in no wise depends upon that fact. The very ground upon which the defendants insisted upon the nonsuit was, that, according to the plaintiff's admission, the last notes were usurious. He stated his motion upon that fact. He cannot complain that the plaintiff thereupon says, If you deny the sufficiency of the last six notes to entitle me to recover, you drive me to my original cause of action, and that is valid. I

admit the usury, but I seek no advantage therefrom. You may rely upon your answer, and my admission of its truth, or not, at your election. If you do not, then I am entitled to recover on two grounds: 1. Because I produce six notes containing your promise to pay; 2. Because they were given as substitutes for and in extension of other six notes which were valid and effectual, and as you have not paid them, I am entitled to recover for the original cause.

If you elect to rely on the admission, then I am entitled, because the taking of a usurious security does not destroy the right to recover for its original and prior valid consideration.

In short, the case is one which could not, probably, have arisen under our former technical rules of pleadings. Its peculiarity is exhibited, because now all the facts material to the recovery may be stated in one count or narration. The plaintiff might, I think, safely have stated the fact that the last notes were usurious, but that would not have made it any plainer,—that, for the money due upon a valid contract, the defendants were liable. The plaintiff has set out twelve notes in his complaint, admitting and averring that the last six were given for and as an extension of the first six. Why, then, shall he not recover? Because he admits that the last six are usurious? That only remits him to his claim by reason of the defendants' indebtedness according to the tenor of the first six. Because the first six were surrendered and canceled? That does not extinguish the debt if there was no actual satisfaction, and the substituted contract is not paid, but was void; and the defendants insist on availing themselves of the admission to that effect.

It hardly seems necessary to cite authorities to these views, but those cited in the opinion of the court below, and more fully by the counsel for the respondent, seem to me to be quite conclusive, if the reasoning upon principle be not satisfactory: See particularly *Rice v. Welling*, 5 Wend. 595; *Hughes v. Wheeler*, 8 Cow. 77; *Vilas v. Jones*, 1 N. Y. 274; *Hill v. Beebe*, 13 Id. 556, and cases cited; *Gregory v. Thomas*, 20 Wend. 20; *Farmers' and Mechanics' Bank v. Joslyn*, 37 N. Y. 353.

The order of the general term of the supreme court granting a new trial must be affirmed, and judgment absolute rendered for the plaintiff in pursuance of the defendants' stipulation.

All affirm.

Judgment affirmed.

WHEN GIVING OF NOTE BY DEBTOR DOES OR DOES NOT OPERATE AS PAYMENT: *Tyner v. Swoops*, 71 Am. Dec. 341, and cases collected in note 347; *Bhnt v. Walker*, 78 Id. 709, and note 718; *Taylor v. Cunner*, 97 Id. 419.

TRANSACTION INVOLVING GIVING OF RENEWAL NOTES, WHEN DEEMED USURIOUS: *Price v. Lyons Bank*, 88 Am. Dec. 368.

PROMISSORY NOTE IS CONTROLLED, AS TO DEFENSE OF USURY, BY LAWS OF STATE WHERE MADE: *Jewell v. Wright*, 86 Am. Dec. 372, and note 374.

DEFENSE OF USURY TO NOTE IS CUT OFF BY INDORSEMENT THEREOF BEFORE MATURITY to a bona fide purchaser without notice: *Woodworth v. Hudson*, 89 Am. Dec. 340, and see note 345.

THE PRINCIPAL CASE IS CITED to the point that where a note is given for a pre-existing debt, and the holder takes usurious interest for the extension of the time of payment, such note, though void for the usury, does not destroy the original cause of action, in *Meyer v. Haneke*, 65 Barb. 315; and to the same effect, in *Real Estate Trust Co. v. Keech*, 7 Hun, 254; *National Bank of Gloversville v. Place*, 15 Id. 566; *Underhill v. Crennan*, 25 Id. 570; *Allison v. Schmitz*, 31 Id. 107; *Kent v. Reynolds*, 8 Id. 561; *Tift v. Moor*, 59 Barb. 625; *Smith v. Heath*, 4 Daly, 125; *Gerwig v. Sitterly*, 56 N. Y. 217; *Patterson v. Birdsell*, 64 Id. 298; but in such cases, the original indebtedness should be brought into the pleading as a ground of recovery: *Hansee v. Phinney*, 20 Hun, 154; and see *Fleishmann v. Stern*, 24 Id. 269; S. C., 61 How. Pr. 123. The principal case is also cited to the point that a promissory note of a debtor, given in renewal, or in place of one similar in form and by the same party, is not a discharge of the liability existing on the first note, although the latter is given up, and after the first note becomes due judgment is recovered thereon and execution issued, but returned unsatisfied, in *First Nat. Bank v. Morgan*, 6 Hun, 348.

WILCOX v. ROME ETC. RAILROAD COMPANY.

[39 NEW YORK, 356.]

IT WILL BE PRESUMED THAT PERSON INJURED IN ATTEMPTING TO CROSS RAILROAD TRACK DID NOT LOOK before crossing, if it appears that, had he done so, he would have seen the approaching train in season to have avoided it.

TRAVELER IN CROSSING RAILROAD TRACK IS BOUND TO EXERCISE at least ordinary sense, prudence, and capacity; and this requires that he should use his ears and eyes, as far as he has opportunity to do so. Failing in this duty, he will be deemed guilty of contributory negligence, precluding a recovery in his favor in case of injury.

NEGLECTANCE OF RAILROAD COMPANY IN NOT RINGING BELL OR SOUNDING WHISTLE near the crossing of a highway does not relieve a person, who is about to pass over the highway, from the obligation to employ his sense of hearing and seeing in order to ascertain if a train is approaching.

ACTION to recover damages for the negligence of the defendants in causing the death of the plaintiff's intestate. The material facts appear in the opinion. A nonsuit was moved for at the close of the plaintiff's evidence, on the ground that

the deceased was guilty of negligence, which was refused. The verdict was for the plaintiff, upon which judgment was entered, and the defendants appealed.

S. T. Fairchild, for the appellants.

Hammond, Winslow, and Williams, for the respondent.

By Court, MILLER, J. The main question which we are to determine in this case is, whether the deceased was guilty of negligence which contributed to the injury that caused his death. At the time when the occurrence took place, he was on the public highway, where he had a perfect right to be, for the purpose of traveling, or of crossing the track. He was familiar with the locality, having lived for some time in the neighborhood, and probably was acquainted with the times for the running of the trains. It was not the time for any regular train to pass; but engines and trains were passing at all hours of the day and night. The engine was running at a speed of fifteen miles an hour, and another engine, called a shifting engine, had gone in an opposite direction to the one which ran over the deceased, of which fact the deceased must have been advised.

The evidence does not show whether the deceased, before attempting to cross, looked up and down the track to ascertain whether a train was coming; but it appears the engine or train was in plain sight, as he could see for a distance of seventy or eighty rods.

It is a fair and reasonable presumption, arising from all the circumstances attending the transaction, that he did not look, for had he done so, he must have seen the engine approaching, and he could have escaped, and his life would have been saved.

I think, therefore, that we must assume that he did not look, and in failing to do so he neglected a plain and imperative duty, and was guilty of negligence, which precludes a recovery. A traveler in crossing a railroad track is bound to exercise at least ordinary sense, prudence, and capacity; and this requires that he should use his ears and eyes, so far as he has opportunity to do so. None of the cases adjudicated exonerate him from thus employing his faculties; and those which are relied upon as sustaining a contrary doctrine are exceptional, and present more strong and controlling facts, which prevented the party from hearing or seeing the train,

so far as I have been able to discover. The later cases, which are supposed to uphold the doctrine that a party is exonerated from the charge of negligence who does not look, only go to the extent of holding that a party is not, in law, guilty of negligence in not seeing an approaching train, when crossing a railroad track, when circumstances existed which tended to show that the sight was obstructed, or to render it at least doubtful whether the party was in fault, so that it was proper for the jury to pass upon the question of negligence.

Without examining all the cases bearing upon the question, I will refer briefly to a few recent cases, which are considered as applicable and decisive.

In *Brown v. N. Y. C. R. R. Co.*, 32 N. Y. 397 [88 Am. Dec. 353], a train had passed, and the plaintiff had stopped for it. A single car had followed at a distance, and he had waited for that; other cars followed, which were not anticipated, and of which the plaintiff had no notice or warning; and it was held that he was not guilty of negligence, in the eye of the law, in not anticipating the detached cars which followed in the rear of the train that had passed.

In *Sullivan v. New York C. R. R. Co.*, 34 N. Y. 29, the same facts existed as in the case last cited, and the same rule was applied.

In *Beisiegel v. New York C. R. R. Co.*, 34 N. Y. 622 [90 Am. Dec. 741], there were freight-cars on one of the tracks, which interrupted the plaintiff's vision, and prevented his seeing the engine approaching, and it was held that he was not in law guilty of negligence.

In *Ernst v. Hudson R. R. Co.*, 35 N. Y. 9 [90 Am. Dec. 761], it was doubtful whether the deceased did not look up and down the track as far as he could see, and whether, if he had done so, he could have seen the approaching train; also, whether he was not misled by the failure to show the flag in accordance with previous custom; and it was decided that the question of negligence of the deceased was for the jury.

It will be seen that none of the authorities cited present a case where the person injured or killed had a full opportunity to see the train as it was moving along, and that there were obstructions to the view, which is not the case here.

It is said that the deceased had no occasion to look behind him, as the engine from which he might reasonably expect danger at the time was in an opposite direction; that his attention would naturally be directed there; and that it was not

within an hour for any regular train to pass. There was evidence to show that trains were passing without regard to the time-table, and every one conversant with the operations of a railroad is aware that extra trains are often run out of the usual order, and without regard to regularity, so as to render it unsafe to pass a crossing during the daytime without taking an observation to see whether a train is then likely to pass. It was remarked by Denio, J., in *Wilds v. Hudson R. R. Co.*, 29 N. Y. 325: "No one can be secure against being met by an engine except by ascertaining, by his own senses, that no train is approaching in either direction, within a distance which will endanger his safety." There is much force in this suggestion; and it would, in my opinion, furnish a very imperfect and unsafe protection to a traveler to rely merely upon his knowledge of the time-table, or upon the fact that an unusual train had passed in an opposite direction, and therefore none other could be expected. The reason urged, I think, furnishes no sufficient excuse for the neglect of the deceased to use his faculties, and for neglecting to exercise a proper degree of vigilance and care.

It is said that, as no bell was rung, or whistle sounded, the deceased was not negligent in not hearing the train as it came near the crossing. The testimony on this subject was conflicting, and we must therefore assume that these signals were not given. Does their omission relieve the deceased from the charge of negligence which contributed to produce the disastrous result which followed? In *Ernst v. Hudson R. R. Co.*, 35 N. Y. 9 [90 Am. Dec. 761], before cited, the opinion of one of the judges holds that the omission of the customary signals is a breach of duty, and an assurance to the traveler that no engine is approaching from either side within eighty rods of the crossing, and that he may rely on such assumption without incurring the imputation of a breach of duty to a wrong-doer. Upon a retrial of the case a verdict was rendered in favor of the plaintiff, and on an appeal to this court the judgment was affirmed. Several of the judges placed their decision upon other and different grounds than the failure to give the necessary signals, and I do not understand that a majority of the court held that such neglect was an assurance of safety which relieved the wayfarer, who did not look, from the imputation of negligence. In *Beisiegel v. New York C. R. R. Co.*, *supra*, the same doctrine is substantially reiterated in one of the opinions which was laid down in the Ernst case;

but the case was not decided entirely upon any such ground. Morgan, J., who also wrote an opinion, concedes "that it is the duty of a person who is about to cross a railroad track to make an observation before crossing"; but he considers him relieved from the charge of negligence when "the vision is constantly obstructed by intervening obstacles, where it is often very difficult to see up and down the railroad track beyond the space of one or two buildings." He also remarks: "When a man on foot reaches a point near the crossing, and listens, and hears no signal or warning, I think he is not guilty of negligence for attempting to cross the track, in a case where he cannot see up and down the track by reason of obstructions." As we have already seen, the decision of each of these cases depended very much upon the fact that the vision of the person killed or injured was obstructed by surrounding objects, and hence they cannot be regarded as settling definitely the principle that a neglect to give the signals exonerates a person from liability, when he fails to look, and has the means of seeing if he does thus look.

A series of adjudications are in conflict with this doctrine. In *Sheffield v. Rochester & S. R. R. Co.*, 21 Barb. 339, the plaintiff was in plain sight of the track, with nothing to obstruct his view. Yet it was held that it was inexcusable negligence, which contributed to the injury, which precluded a recovery. There was evidence on both sides as to the ringing of the bell, but the verdict being in favor of the plaintiff, it settled the question that no signal was given. In *Brooks v. Niagara Falls R. R. Co.*, 25 Id. 600, it was assumed that no bell was rung, and decided that a person who crosses a railroad track in ignorance of the approach of a train, when the danger may be easily seen by looking for it, is fairly chargeable with negligence. This case was affirmed on appeal by this court; and it was held that an attempt to cross a railroad track, without looking up and down to see if a train is approaching, is such an act as a man of ordinary prudence would hardly be guilty of: See *Mackey v. New York C. R. R. Co.*, 27 Id. 532, note. In *Dascomb v. State Line and Buffalo R. R. Co.*, 27 Id. 221, it was held that, to authorize a recovery against a railroad company, for damages sustained by reason of the neglect of the agents to ring a bell or sound a whistle, it must appear that such neglect was the sole cause of the damage; and if the plaintiff was himself guilty of negligence which contributed to the

injury, he cannot recover, notwithstanding this omission of duty by the company.

In *Mackey v. New York C. R. R. Co.*, 27 Barb. 528, although the fact whether a signal was given was in doubt, and the jury found against the defendant, the new trial was granted on account of the plaintiff's negligence.

In *Steves v. Oswego and Syracuse R. R. Co.*, 18 N. Y. 422, this court held that it was not enough to entitle the plaintiff to recover that he established that the defendant neither rang the bell nor sounded the whistle, where the plaintiff himself was guilty of negligence in not seeing or hearing the cars, and a nonsuit on the trial was sustained.

In *Mackey v. New York Central R. R. Co.*, 35 N. Y. 75, the liability of the defendant was put upon the ground that the company had obstructed the view of travelers on the public highway by piling wood, so that the approach of a train could not be seen at the crossing until the traveler was on the track.

In *Renwick v. New York Central R. R. Co.*, 36 N. Y. 132, it appeared that the plaintiff had stopped and listened from four to six rods from the track, and hearing no signal and no indication that the train was approaching, he started his horses and continued looking until he reached the track, and then turning his eyes to the right, found them upon him, the judgment for the plaintiff was upheld.

The effect of the cases cited is to sustain the principle, that where the negligence of the party injured or killed contributes to produce the result, he cannot recover; and that the omission of the company to ring the bell or sound the whistle near the crossing of a highway does not relieve the person, who is about to pass over the highway, from the obligation of employing his sense of hearing and seeing, to ascertain whether a train is approaching. They are entirely applicable to the case before us, and, in the absence of any authority which holds a contrary doctrine where the naked question is presented which now arises, I think they are decisive and controlling.

It is very plain that the deceased could have seen the approaching train, had he looked for that purpose. There were no obstructions to his vision, and no occasion to divert his attention which excused him from observing. He recklessly and carelessly neglected to exercise that prudence and care which the circumstances demanded, and exposed himself needlessly and unnecessarily to danger and to certain death. His negligence was inexcusable; and as actions of this char-

acter are founded upon the principle that the party claiming damages must not contribute to produce the injury, it is difficult to see how any negligence of the party inflicting the injury can obviate the difficulty. To prove that a party is excused where he has been careless, because the other party has failed to give the accustomed signals, or for any other act of negligence on his part, strikes at the principle upon which such actions are based. Such a rule is not sustained by any of the adjudged cases. And from the consideration I have bestowed upon the subject, I am not prepared to uphold such a doctrine. The motion for a nonsuit, in my judgment, was improperly overruled, and for this error the judgment should be reversed, and a new trial granted, with costs to abide the event.

GROVER, J. The only question necessary to examine in the present case arises upon the exception taken by defendants' counsel to the denial of his motion for a nonsuit. This motion was made upon the following, among other grounds: that the intestate was guilty of negligence, contributing to the injury received by him. It is unnecessary to consider any of the other grounds; the testimony relating to this was in no essential particular conflicting. It was proved that, in the daytime, the deceased was walking upon or by the side of the track of the defendants' road, in the village of Watertown, toward Court Street; that after he had got within the bounds of the street, as settled by the verdict, and within about twenty feet of the traveled portion thereof, he was struck by an engine, running upon the defendants' road at the rate of twelve or fifteen miles per hour, in the same direction the deceased was walking, and received thereby an injury causing his death; that this engine could have been seen by the deceased where he was walking, and where he was struck, for a distance of fifty or sixty rods, had he looked behind him along the track; that there was nothing to obstruct the view for that distance.

The only question in the case, therefore, necessary to consider is, whether it was negligence in the deceased to expose himself in that dangerous position, without even looking along the track behind as well as before him, to see if there was a train approaching. That he did not look is established by the fact that if he had, he must have seen the train in ample time to have enabled him to step off from the track, and thus have

avoided the danger, which he failed to do. There was no explanation of this conduct of the deceased; no evidence of any other engine in motion in the vicinity, or any cause whatever assigned for diverting the attention of the deceased from his own safety. Under such circumstances, to walk along or stand upon a railroad track without availing himself of the sense of sight as well as hearing, to ascertain whether there was danger in such position, is not only negligence, but borders upon rashness. It is no answer to say that this engine was not moving at that point upon the time of any regular train. If the deceased was sufficiently acquainted with the business of the defendants as to know the time of the different trains, he must also have known that working and other trains and engines passed over the road, or portions of it, at other times; that it was necessary for them so to do, in order to avoid the regular trains. It would be the grossest carelessness for one to place himself upon the track without at all attending to his safety, relying upon the fact that it was not the time for a regular train to pass over that portion. That this negligence of the deceased contributed to his injury is manifest from the fact that had he not been guilty of it he would have known of the approach of the engine, and have avoided the collision by stepping off the track. If the deceased had ordinary hearing, it is almost inconceivable that he failed to hear the train, whether or not the bell was rung, in season to have avoided the danger, unless his attention was thoroughly engrossed by something foreign to his own safety in the position in which he had placed himself. He certainly could not have been relying upon any assurance of the defendant that no train was approaching, from their failure to ring the bell, for the reason that had he listened enough to make sure that no bell was ringing within eighty rods behind him, he must have heard the noise of the engine in season to have avoided the danger by leaving the track. All the authorities agree that no recovery can be had where the negligence of the party injured has contributed to the injury. The cases have been so often reviewed that a repetition would be superfluous. The judge erred in not granting a nonsuit, on the ground of the negligence of the deceased.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide the event.

Judgment reversed.

PERSONS ABOUT TO CROSS RAILROAD TRACK ARE BOUND TO TAKE NECESSARY PRECAUTION TO AVOID INJURY: *Chicago etc. R. R. Co. v. Still*, 71 Am. Dec. 236, and cases collected in note 239; *Beisiegel v. New York Cent. R. R. Co.*, 90 Id. 741, and cases collected in note 751; *Ernst v. Hudson River R. R. Co.*, 90 Id. 761, and extended note on subject 780.

THE PRINCIPAL CASE IS CITED to the first two points stated in the *syllabus* in the following cases: *Parsons v. New York etc. R. R. Co.*, 37 Hun, 134; *Mitchell v. New York etc. R. R. Co.*, 2 Id. 538; S. C., 5 Thomp. & C. 125; 64 N. Y. 656; *Reynolds v. New York etc. R. R. Co.*, 2 Thomp. & C. 646; *Ingersoll v. New York etc. R. R. Co.*, 6 Id. 417; *Hewitt v. New York etc. R. R. Co.*, 3 Lana. 85; *Haight v. New York etc. R. R. Co.*, 7 Id. 13; *Gonzales v. New York etc. R. R. Co.*, 38 N. Y. 440; but see S. C. again, 39 How. Pr. 412; *Havens v. Erie R'y Co.*, 41 N. Y. 299; *Baxter v. Troy etc. R. R. Co.*, 41 Id. 503; *Harty v. Central R. R. Co.*, 42 Id. 473; *Gillespie v. Newburgh*, 54 Id. 471; *Salter v. Utica etc. R. R. Co.*, 75 Id. 278; and is cited to the third point stated in the *syllabus* in *McGrath v. New York etc. R. R. Co.*, 59 Id. 472. It is cited to the point that where there is no conflict in the evidence, and the plaintiff, by reason of some act or omission, is obviously and clearly chargeable with contributory negligence, the court should so hold as matter of law, and dismiss the complaint, in *Van Lien v. Scoville Mfg. Co.*, 14 Abb. Pr., N. S. 76; and see *Smith v. Smith*, 18 Jones & S. 506; and is distinguished in *Masboth v. Delaware etc. Canal Co.*, 64 N. Y. 529; *Gonzales v. New York etc. R. R. Co.*, 39 How. Pr. 414.

MALI v. LORD.

[39 NEW YORK, 331.]

UTMOST GOOD FAITH AND FIRMEST BELIEF THAT PERSON HAS STOLEN GOODS, AND SECRETED THEM about his person, will not justify the owner of the goods in arresting, detaining, and searching, by the aid of a policeman, the suspected person; and in action for damages therefor, good faith is only material on the question of damages.

MASTER IS RESPONSIBLE, CIVILLY, FOR FRAUD, NEGLIGENCE, or other wrongful act of his servant, committed in the transaction of his business, but not for willful injury committed by the servant while so engaged, unless it was done by the express or implied authority of the master.

ONE EMPLOYED TO SELL GOODS IN HIS EMPLOYER'S ABSENCE, OR TO SUPERINTEND HIS EMPLOYER'S BUSINESS at a particular store, has no implied authority to arrest and search a person suspected of having stolen goods and secreted them about his person, so as to render the employer liable in damages for such an arrest and search.

SERVANT HAS NO IMPLIED AUTHORITY TO DO THAT WHICH the master himself, being present, would not be authorized to do.

ACTION to recover damages for an alleged illegal arrest and imprisonment. The plaintiff was in the defendants' store purchasing goods, in the absence of the defendants; and the superintendent and clerks, suspecting the plaintiff of having stolen goods, called in a policeman, and had her arrested and

searched; but no goods were found upon her person. She then brought this action for damages. The answer was in substance a denial of the complaint. After the plaintiff rested, defendants' counsel moved for a dismissal of the complaint, mainly upon the ground that the acts complained of were not shown to have been committed by the defendants, or by their authority, but to have been willful trespasses, for which the defendants were not liable,—which motion was denied. Other facts appear in the opinion. The verdict was for the plaintiff for four thousand dollars, upon which judgment was rendered, and the defendants appealed.

C. L. Spelthorn and J. B. Fogarty, for the respondent.

J. L. Graham, for the appellants.

By Court, GROVER, J. The question whether the plaintiff was detained and searched against her will was conclusively settled in her favor by the verdict. The evidence fully warranted the submission of this question to the jury. There was no prosecution against the plaintiff instituted; calling in the policeman, and informing him of the suspicion entertained against the plaintiff, and of the facts upon which it was grounded, had not the semblance of a criminal prosecution, and consequently, whether these and the subsequent acts were done in good faith on the part of the superintendent, or maliciously, were only material upon the question of damages, provided the defendants were liable therefor. The utmost good faith, and the firmest belief that a person has stolen and secreted about his or her person goods will not justify the owner in detaining and searching the suspected person; consequently, the acts of the superintendent of the defendants cannot be justified upon these grounds, nor this action barred, if the defendants are responsible for his acts in this respect. Calling in the policeman, and his presence and participation, affords no justification. The policeman had no right to order the search of the plaintiff by the female, and he could confer no power upon any one to make the search. The exceptions taken to the judge's ruling upon these questions were correct. The material question upon the merits is, whether the defendants were liable for these acts of their superintendent. A master is responsible, civilly, for the fraud, negligence, or other wrongful act of his servant, committed in the transaction of his business. This is the general rule:

Griswold v. Haven, 25 N. Y. 526 [82 Am. Dec. 380], and cases cited. He is not responsible for the willful injury committed by the servant, while so engaged, unless such injury results from the business transacted by the servant for his master: *Wright v. Wilcox*, 19 Wend. 343 [32 Am. Dec. 507], and cases cited; *Hibbard v. New York and Erie R. R. Co.*, 15 N. Y. 455. In the former case, it was held that the master was not responsible for an injury caused by his servant in willfully driving his wagon over a person. That in doing such an act willfully, the servant was not engaged in his master's business, but had, in respect to this act, departed therefrom. In *Griswold v. Haven*, *supra*, it was held that the principal was responsible for the fraud of his agent, committed in transacting the business of the principal. In *Sandford v. Eighth Ave. R. R. Co.*, 23 N. Y. 343 [80 Am. Dec. 286], it was held that the master was responsible for the act of his servant in wrongfully ejecting a passenger from the train, and responsible also for any acts of aggravation in doing the act causing an injury to the passenger. This judgment was based upon the principle that a part of the duties of the servant was to exclude from the cars such passengers as refused to pay fare, or to comply with the regulations adopted by the company; and that having authority from the master to perform such acts, all such acts done by the servant were to be regarded as done by virtue of this authority, and in the execution of the master's business, and that consequently the master was liable for all injuries sustained from the wrongful acts of the servant in their performance. Applying these principles to the present case, the inquiry is, whether a merchant, by employing a clerk to sell goods for him in his absence, or a superintendent to take the general charge and management of his business at a particular store, thereby confers authority upon such clerk or superintendent to arrest, detain, and search any one suspected of having stolen, and secreted about his person, any of the goods kept in such store. If he does, he is responsible for such acts of the clerk or superintendent. If not, then such acts are not within the scope of the authority delegated to the superintendent, and the employer is not responsible therefor, for the reason that, while in their performance, the servant is not engaged in the business of the master any more than in committing an assault upon or slandering a customer. In examining this question, it must be assumed that, by the employment, the master confers upon the servant

the right to do all necessary and proper acts for the protection and preservation of his property, to protect it against thieves and marauders; and that the servant owes the duty so to protect it to his employer. But this does not include the power in question. It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself if present. The master would not, if present, be justified in arresting, detaining, and searching a person upon suspicion, however strong, of having stolen his goods and secreted them upon his person.

The authority of the defendants to the superintendent could not, therefore, be implied from his employment. The act was not done in the business of the defendants, and they were not, as masters, responsible therefor. If not responsible if the superintendent acted in good faith in the belief of the plaintiff's guilt, they clearly would not be if he acted from malice, in the absence of such belief. The plaintiff having, at the time of resting, given no evidence connecting the defendants with the clerk and superintendent, except their employment by the former, the motion of defendants for a dismissal of the complaint should have been granted by the judge, and the exception to his refusal was well taken. The attempt in the answer to justify the act was no evidence against the defendants upon the issue presented by the denial of having committed the acts. The only remaining question upon this part of the case is, whether, at any subsequent stage of the trial, the defect in the plaintiff's proof was supplied. All the evidence given having any such tendency was the answer of one of the defendants to the question, "Has it not occurred sometimes in your store that your clerks have arrested persons suspected of having purloined goods?" To which the witness answered: "I believe it is very likely"; and to the further question, "Whether done by authority of the foreman?" To which he answered, "Not by my authority as one of the firm, — I never gave any such instructions"; and his answer to a further question, "that he had never witnessed such an occurrence." This was clearly insufficient to charge the defendants. The judgment must be reversed upon the exception to the judge's refusal to grant the motion to dismiss the complaint. The other exceptions it is unnecessary to examine.

Judgment reversed.

LIABILITY OF MASTER FOR ACTS OF SERVANT OR AGENT: See *Moir v. Hopkins*, 63 Am. Dec. 312, and note 315; *Zulkes v. Wing*, 91 Id. 425, and cases collected in note 428.

MASTER IS NOT LIABLE FOR ACTS OF SERVANT WILLFULLY AND INTENTIONALLY DONE without command or authority: *Cox v. Keahey*, 76 Am. Dec. 325, and note 328.

THE PRINCIPAL CASE IS CITED to the point that when the servant acts outside of the duties of his employment, and without express directions, his act ceases to be that of the master, and the servant, and not the master, is liable for the consequences, in the following cases: *Courtney v. Baker*, 5 Jones & S. 255; *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 127; *Cosgrove v. Ogden*, 49 Id. 258; *Mott v. Consumers' Ice Co.*, 73 Id. 548; *Garretsen v. Duenskel*, 50 Mo. 109; *Carter v. Howe Machine Co.*, 51 Md. 297; it is cited to the point that the duty of a brakeman upon a freight train to preserve and protect the company's property, and prevent any unlawful trespass upon it, flows from his employment as a servant in the care of property, in *Hughes v. New York etc. R. R. Co.*, 4 Jones & S. 222; and is cited to the fourth point stated in the *syllabus*, and applied in *Lynch v. Metropolitan El. R. R. Co.*, 24 Hun, 508. It is cited and explained in *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 135, 138.

SPRAIGHTS v. HAWLEY.

[39 NEW YORK, 441.]

MERE POSSESSION OF MORTGAGED CHATTEL BY MORTGAGOR IS NOT SUCH EVIDENCE OF OWNERSHIP, or authority to sell the property, as will protect, against the claim of the mortgagee, one who, as agent of the mortgagor, sells the property and pays the proceeds in good faith to his principal, in the belief that he was the true owner.

POSSESSION OF CHATTEL IS NOT, AS IN CASE OF NEGOTIABLE PAPER OR MONEY, ASSURANCE OF TITLE, or authority to dispose of it. And he who assumes to deal or intermeddle with personal property not his own must see to it that he has a warrant therefor from some one who is authorized to give it.

WHERE ONE OF TWO INNOCENT PERSONS MUST SUFFER by the wrong of another, the one who enables such other to commit the wrong must bear the consequences.

MERE POSSESSION OF ANOTHER'S PROPERTY IS NOT SUCH EVIDENCE OF OWNERSHIP or authority to sell that third persons have a right, as against the true owner, to rely thereon.

ACTION for the recovery of damages, alleged to have been sustained by the plaintiff by reason of a sale by the defendant of certain jewelry, which had been mortgaged to the plaintiff by one Ashby and his wife to secure the payment of a debt due to him from Ashby. The referee found as facts, that Ashby was indebted to the plaintiff and that he and his wife mortgaged the jewelry in question (being the wife's property) to secure the payment of the debt in one year; that the

jewelry remained in the possession of the mortgagors, but the mortgage was duly filed; that some months after the mortgage debt became due the plaintiff brought an action to foreclose, which action was tried before a referee, who reported in favor of the plaintiff; that prior to said report, Ashby engaged the defendant to sell the jewelry, and that he did sell it, and paid the proceeds to Ashby, without charge for his services; and that the defendant acted simply as the agent of Ashby, or Ashby and wife, without notice of the mortgage or title of the plaintiff, in good faith. Other facts appear in the opinion. The referee reported that, upon the facts found, it was not just that the plaintiff should recover. The judgment entered upon this report in favor of the defendant was reversed in general term, and a new trial ordered. The defendant appealed.

George F. Comstock, for the appellant.

R. Woolworth, for the respondent.

By Court, WOODRUFF, J. The facts in this case show title in the plaintiff to the property in question, and a disposition thereof by the defendant avowedly and solely as agent for Eugenia Ashby, the former owner and one of the mortgagors.

The defendant's answer avers that he acted as such agent, without any interest or claim of interest in the same, or its proceeds. The referee finds as a fact that he acted simply as the agent of Charles Ashby, or of Charles Ashby and his said wife.

The title of the plaintiff was valid, both upon the facts found, and upon the legal conclusions stated by the referee.

It follows that the disposition of the property by Ashby and wife was a tortious conversion thereof, and so the referee finds.

No question of fraud in the mortgage to the plaintiff or otherwise, nor any failure to place his mortgage on file pursuant to the statute, was deemed by the referee or by the supreme court nor by the counsel for the appellant, to arise in the case; because, as against the mortgagors and their mere agent, the *bona fides* of the mortgage, and the filing thereof, were regarded as wholly immaterial, and as against them the mortgage was held valid, even though made to defraud creditors, and whether filed or not. It is, however, more satisfactory to say that both good faith and due filing, and renewal of the mortgage, are facts in the case duly proved and found.

The case, therefore, raises the single question whether the possession of the mortgagors is such evidence of ownership or of authority to make sale of the property that the defendant, acting in good faith as their agent, in the belief that they were owners, is protected thereby against the claim of the plaintiff to recover for a sale and disposition thereof. Some stress was laid upon the fact that this transaction was more than a year after the mortgage debt became payable, and the continued possession of the mortgagors during that time is claimed to be laches on the part of the plaintiff, warranting the defendant in trusting to their apparent ownership and executing their direction to sell the property.

This reasoning, sought to be applied to this case, seems to me to overlook the fact found by the referee, that for more than a year of that period the plaintiff had been in the actual prosecution of an action to enforce his rights against the mortgagors; and the further circumstance that the defendant is in no wise shown to have been affected by or to have had any knowledge whether the mortgagors had been in the possession of the property one year or one day. He was not misled into any trusting to a long-continued possession, for it does not appear that he ever saw or heard of the property until the day on which it was brought to him for sale.

I do not, however, attach importance to this, for I am not aware of any principle or any authority which makes such mere possession, in the absence of fraud, amount to a justification to the agent in a fraudulent disposition of the property.

It is placed by the appellants upon some general idea that because the mortgagors had possession, and the defendant honestly believed they were owners, and in that belief, innocent of any wrongful intent, sold the property and paid over the proceeds, it is not just that he should be held responsible. In other words, it is, as to the defendant, a hard case.

Now, all this would be very well, if it were true that mere possession of personal property was such evidence of ownership or of authority to dispose thereof that all persons were at liberty to assume such ownership or authority, and act in reliance thereon. Unfortunately for the appellant, this is not so. Indeed, the cases in which possession imports such authority are very few, and the mere fact of possession, unaccompanied by other circumstances, giving it a specific character, indicative of authority, never does.

Indeed, every consideration which is urged for the protection of the defendant would have appealed as strongly in his behalf if it had appeared that Ashby had stolen the property from the plaintiff. Ashby's possession would have borne the same aspect of apparent ownership, and the defendant's sincere good faith and innocence of wrong would have been equally deserving of consideration.

True, in such case, the possession of Ashby would have been against the will of the plaintiff; but even then, why should it not be said that the plaintiff should have taken care that his property be not stolen, and not suffer the innocent defendant to become a sufferer?

But take a stronger case: Suppose the property had been loaned by the plaintiff to Ashby; it would not, in that case, be claimed, any more than if stolen by the latter, that Ashby's possession would protect the defendant, and yet the hardship of holding him responsible would be in all respects the same as in this case.

I consider that it is hard in one sense that the defendant should be compelled to indemnify the plaintiff. It is so, because it is not easy always to be perfectly safe in one's dealing.

But chattels are not negotiable. Possession is not, as in the case of mercantile paper and money, assurance of title or of authority to dispose of. The servant intrusted with the possession of his master's property does not thereby give authority to sell it or to authorize another to sell it. The borrower of a chattel, or the ordinary bailee, does not by his possession gain any such power. And in short, the rule that no one can be deprived of his title without his own consent has no such exception as is sought to be created in this case. And the converse rule, that he who assumes to deal or intermeddle with personal property which is not his own must see to it that he has a warrant therefor from some one who is authorized to give it, has no such qualification: *Anderson v. Nicholas*, 5 Bosw. 130, and cases cited. If he buys from or consents to act by direction of another, he must see to it that in the responsibility of such other he can find indemnity if his confidence is misplaced.

All there is, therefore, of hardship to the defendant is, that he has undertaken to execute a commission for Ashby or Ashby and wife, and if, in consequence of acting upon the fraud or misrepresentation, he is subjected to liability to the

plaintiff, he will have to look to them for indemnity. Perhaps the finding of the referee indicates that Ashby is insolvent; if so, that makes the hardship. But even that is not a peculiar case; it is most common in the affairs of business; and having, as the referee finds, heard that Ashby was insolvent when he undertook the commission, he might have known that his recourse to him for indemnity might fail.

The doctrine of the cases cited in the prevailing opinion in the supreme court does not appear to be controverted by the counsel for the appellant, and yet they seem to me decisive in this case of the principle that the agent, in a tortious conversion of another's property, is liable when his principal is guilty of the tort; and even though the agent act innocently in good faith, relying on the possession and apparent authority (if possession be deemed such) of his principal: *Perkins v. Smith*, 1 Wils. 328. An innocent clerk sold goods for the use of his master: *Stephens v. Elwell*, 4 Maule & S. 259; an innocent clerk received goods from his master's agent, and sent them to his master abroad. In this case, the observation of Lord Ellenborough covers this whole case: "The only question is, whether this is a conversion in the clerk which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another who had himself no authority to dispose of it": *McCombie v. Davis*, 6 East, 358; *Baldwin v. Cole*, 6 Mod. 212; *Throop v. Bussing*, 11 Johns. 285; *Farrar v. Chauffetete*, 5 Denio, 527; *Pierson v. Graham*, 33 Eng. Com. L. 468; *Everett v. Coffin*, 6 Wend. 609 [22 Am. Dec. 551]; *Spencer v. Blackman*, 6 Id. 167; *Williams v. Merle*, 11 Id. 80 [25 Am. Dec. 604].

And these cases recognize and affirm the more general rule above stated, that he who intermeddles with personal property not his own must see to it that he is protected by the authority of one who is himself, by ownership or otherwise, clothed with the authority he attempts to confer.

Recurring again to the able and ingenious argument in support of the appeal, and to the point that the plaintiff was guilty of laches, and that by supposing the mortgagors to be in possession he enabled them to deceive the defendant and produce the result: this assumes that it is negligence in the owner of

personal property to permit it to be in the possession of another. I am not aware of any warrant for such assumption. So long as it is true that a mortgage given in good faith and for sufficient consideration is valid, notwithstanding possession may be in the mortgagor, so long such possession no more involves culpable negligence or laches in the mortgagee than the possession of a servant, hirer, or other bailee, imports negligence in the owner. In truth, so long as mere possession does not import authority to sell, the negligence, if any, is on the part of him who relies upon it, and not on the owner who permits it.

And the suggestion gains no strength from the observation that if the plaintiff had not supposed the mortgagors to be in possession it would not have been in their power to deceive the defendant; and where one of two innocent persons must suffer by the wrong of another, the one who enables such other to commit the wrong must bear the consequences. How did the mere possession of the mortgagors enable them to commit the wrong? Only by giving them physical power to deliver the property. The maxim is not true in the sense in which it is sought to be here applied. If it were, then, as in the other cases above referred to, whenever an owner suffers his property to go out of his manual keeping or presence, he is liable to lose it by the same means employed here, and is exposed to the maxim here invoked for the defendant's protection. It is only when the owner has parted with the legal title upon some secret trust or condition, or has done something calculated to mislead, upon which a third person has a right to rely, and on which he does rely, as evidence of authority, that such maxim could have any application. And the attempt to apply it here begs the whole question: See Cowen, J., in *Ash v. Fulman*, 1 Hill, 307. Mere possession of another's property is not such evidence of ownership or authority to sell that third persons have a right, as against the true owner, to rely thereon.

They may act in faith thereof if they please, but they must rely upon the party with whom they deal, and look to him for indemnity if the title fails, or they be deceived or defrauded into a condition of responsibility.

This is the defendant's situation; he has trusted the representations of Ashby. He has been deceived thereby, and he must look to him for indemnity.

The order of the general term of the supreme court granting a new trial should be affirmed; and in pursuance of the de-

fendant's stipulation, judgment absolute for the plaintiff must be rendered.

All concur.

Order of general term affirmed, and judgment absolute for plaintiff, with costs.

POSSESSION OF PERSONAL PROPERTY IS ONLY PRIMA FACIE EVIDENCE OF OWNERSHIP, and never prevails against the true owner, except with reference to negotiable instruments and whatever comes under the general denomination of currency: *Wright v. Solomon*, 79 Am. Dec. 196, and note 203; *Bergen v. Riggs*, 85 Id. 304, and note 306.

THE PRINCIPAL CASE IS CITED AS MAINTAINING the rule that the lawful owner cannot be deprived of his property by the act of a person wrongfully making sale of it, where he has done nothing that can properly lead the purchaser into the belief that the person he may deal with has the right to transfer its title, in *Bassett v. Lederer*, 1 Hun, 279; S. C., 3 Thomp. & C. 675; it is cited to the point that no action against a wrong-doer is necessary in order to lay the foundation of an action against one receiving from him, in *Farwell v. Importers' etc. Nat. Bank*, 90 N. Y. 491; and to the point that trover may, in many cases, be maintained against a person innocent of any intentional wrong, in *Hathaway v. Johnson*, 55 Id. 97. It is distinguished in *Paddon v. Taylor*, 44 Id. 376; S. C., 10 Abb. Pr., N. S., 373; *Hoyt v. Baker*, 15 Id. 412; *Turner v. Brown*, 6 Hun, 337.

VOORHEES v. VOORHEES.

[39 NEW YORK, 463.]

WILL DESTROYED BY TESTATOR HIMSELF IN HIS LIFETIME, ACTING UNDER FRAUDULENT AND UNDUE INFLUENCE, is a will "fraudulently destroyed," and may be admitted to probate on establishing facts showing the existence and due execution of the will, and its destruction by reason of such improper influence.

THE opinion states the case.

G. W. Danforth, for the appellant.

T. R. Strong, for the respondent.

By Court, CLERKE, J. This is an action brought by the widow of James Voorhees, deceased, to set aside a deed made by him to the defendant, their son, conveying a farm containing one hundred acres of land in the town of Romulus and county of Seneca. It is also brought for the purpose of proving and establishing a will of the said James Voorhees, which had been previously made, and which was afterwards destroyed in his lifetime, by which will fifty acres of the said

land were devised to the plaintiff for life, and after her decease, to the testator's children. The alleged grounds of the action are, that James Voorhees had not sufficient mental capacity to make a deed or to revoke a will at the time of the execution of the one and the revocation or destruction of the other. He died about January 31, 1863, leaving the plaintiff and several children and grandchildren his heirs at law and next of kin, all of whom are defendants in this action. On the 2d of July, 1855, he made his last will and testament above referred to. On the 2d of December, 1861, he executed the above-mentioned deed to his son, and about the 1st of May, 1862, the said will was destroyed.

1. Proof of the execution and publication of the will was doubtless a necessary preliminary at the trial. To authorize the supreme court to allow an alleged lost or destroyed will to be proved as such, it is essential,—1. To prove that it had been properly executed and published, pursuant to the requirements of the revised statutes relative to the execution, attestation, and publication of wills. The referee has expressly found that this will was duly executed and published by James Voorhees as his last will and testament; but it is contended by the appellant's counsel that the referee had no evidence before him on which he could have based such a finding. I think that the counsel greatly errs on this point. It appears to me, not only that there was evidence tending to prove the execution and publication, but none tending to contradict these facts. Brown and Kinne, the attesting witnesses, testify that Voorhees, the testator, could not write, but Coe, who had drawn the instrument, signed the name of Voorhees at his request, when the latter added his mark, and declared the instrument to be his last will and testament. He requested the witnesses to attest it, both being present; and both accordingly signed it as witnesses. But it is asserted, as Coe instructed him that it was necessary to declare it to be his last will and testament, and to request the witnesses to sign it, his having done so only "indicates acquiescence in the direction of Coe, but no intelligent action of the testator's mind, or expression of any wish on his part." If this is so, very few wills executed by men not of the legal profession can be sustained. In most cases, the precise circumstances occur which are disclosed in this case. Very few men intending to make a will examine the statute relative to the execution, attestation, and publication of wills. They trust exclusively to the directions

and suggestions of their legal adviser; and if he is prudent, he mentions the requirements of the statute in their proper order. In the present case, the legal gentleman who had prepared the will superintended its execution, and made the necessary suggestions in relation to what the statute required as to its execution and publication.

2. The counsel of the appellant likewise contends that there is no evidence to support the finding of the referee that James Voorhees executed the deed, and destroyed, or caused to be destroyed, the will, under the undue influence of George W. Voorhees, and in belief in the truth of a false and fraudulent statement made by the said George. The counsel errs also on this point. If this case was tried before me as a judge or referee, I am by no means certain that I should have arrived at this conclusion of fact. The grantor was, I think, of sufficient mental capacity to make a valid disposition or conveyance of his property, if he was free from undue influence; but the referee had evidence before him that Voorhees was over eighty years of age, was intemperate in his habits, quite infirm physically, and so enfeebled in intellect that he might be easily misled and defrauded by one in whom he had confidence. It was also proved that the defendant, who was living with his own family some miles distant from his father, went to his father's house, and took him to his own house on a visit, and while there, by misrepresentations, procured the execution of the deed in question. To say the least, there was some evidence of undue influence; consequently, we cannot disturb the finding of the referee on this subject.

3. Do the facts of this case bring it within the provisions of the statute relating to the probate of wills lost or destroyed? As we have seen, the referee expressly finds that James Voorhees destroyed or caused to be destroyed the will, under the influence of George W. Voorhees. This finding was contained in his original report; but afterward, during the settlement of the case, he adds to a finding that the will was destroyed by James Voorhees himself, or is lost. If this was the only conclusion purporting to be a finding, it probably would not be sufficient on which to base a legal conclusion. Being in the alternative, it is, in fact, no finding at all. But as we have a finding which is absolute on this point, it is not necessary to resort to the finding afterward introduced, even if it were to be deemed properly in the case, and the only question is, Was any evidence before the referee tending to

show that the will was destroyed by the testator himself, under the fraudulent influence and instigation of George W. Voorhees. As we have already seen, there was testimony tending to prove the feebleness of James Voorhees, mentally and physically, the undue influence exercised by his son over him, and his own declarations—which were admitted without objection—that he had destroyed the will. There was some evidence, therefore, tending to show that the will was destroyed by the testator himself, under the undue influence and at the instigation of George W. Voorhees; and the finding of the referee, deduced from that evidence, cannot be disturbed.

4. The referee having decided, as a fact, that James Voorhees destroyed the will himself, under this influence, we have now to consider whether such a destruction is within the aim of the provisions of the statute relating to the proof and probate of wills lost or destroyed.

The language of the statute is: "No will of any testator, etc., shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator." This language does not limit the act of destruction to any special instrumentality. To be sure, whatever might have been the motives of the testator himself, with his mind liberated from all external influences, fraud could not be predicated of the act. But by the finding of the referee, the testator himself was not the only person who committed the act. The testator only consummated what was designed and put in motion by his son George, under whose sinister influence he did what, if left to the operation of his own untrammelled will, he would not have done. If George surreptitiously took possession of this instrument and destroyed it himself, no one would hesitate to say that it was fraudulently destroyed; or if, instead of destroying it with his own hands, he employed his next-door neighbor to do so, neither will any one hesitate to say that the will was fraudulently destroyed. Under the finding, the testator, in the performance of this act, was as much the mere instrument of the fraudulent design of George as the neighbor in the example which I have just adduced. The counsel for the defendant lays down the broad proposition that "an influence to vitiate must amount to force and coercion, destroying free agency, a deprivation of the free

exercise of one's own will, so that another's mind, and not his own, must have willed the act complained of." The counsel means by "force and coercion" physical acts of violence. I certainly think he can find nothing in the elementary books, or in the cases to which he has referred, which can sustain such a proposition. In one of these cases, *Tyler v. Gardner*, 35 N. Y. 559, the whole tenor of the reasoning is against him. The influence exercised by Mrs. Tyler over Mrs. Gardner, her mother, was of the same nature as that exercised by George Voorhees over his father. There is a remarkable similarity in these cases. Mrs. Gardner, like James Voorhees, was in feeble health, her mind was impaired, under the active and controlling influence of the principal beneficiary, imbued with antipathy to a relative who would have profited from the estate if the act complained of had not been performed; and this act involved a complete revolution of intention, and an entire departure from a previous testamentary disposition. No influence amounting to force or coercion was in either case employed. The act was the result of persuasion and misrepresentation, operating upon a mind bereft of its own independent will, helplessly—as far as its innate energies were concerned—under the influence of another mind. I therefore regard *Tyler v. Gardner*, *supra*, as only strong authority in favor of the proposition that the established facts of the case before us bring it within the provisions of the statute relating to the proof or probate of wills lost or destroyed. The motion to dismiss the complaint was properly denied; the objections to the rulings of the referee relative to the testimony were not referred, and I presume they are abandoned, too, in the argument. At all events, I consider them untenable.

The judgment should be affirmed, with costs.

Judgment affirmed.

UNDUE INFLUENCE AND FRAUD, WHAT IS: *Taylor v. Kelly*, 68 Am. Dec. 150, and note 158; *Baldwin v. Parker*, 96 Id. 697.

DECLARATION OF TESTATRIX THAT SHE DESTROYED WILL, ADMISSIBILITY OF: *Lawyer v. Smith*, 77 Am. Dec. 460.

EQUITY MAY SET UP WILL WHERE IT HAS BEEN LOST, DESTROYED, OR SUPPRESSED, either by accident or fraud: *Townsend v. Townsend*, 94 Am. Dec. 184, and note 194.

THE PRINCIPAL CASE IS CITED to the point that where a will, duly executed, has been lost or destroyed, by accident or design, before it was duly proved and recorded, an action to establish it may be maintained, in *Hatch v. Sigman*,

1 Demarest, 521; to the point that the *factum* of a lost or destroyed will must be established in the same manner as if the will itself were produced in court for probate, in *Collyer v. Collyer*, 4 Id. 58; and is cited as an authority for setting aside a conveyance on the ground of fraud and undue influence, in *Brand v. Brand*, 39 How. Pr. 275; *Platt v. Platt*, 2 Thomp. & C. 29, nota.

PUMPELLE v. PHELPS.

[40 NEW YORK, 59.]

VENDOR WHO CONTRACTS TO SELL AND CONVEY LAND MUST RESPOND TO VENDEE IN DAMAGES, to the extent of the difference between the contract price and the value of the land at the time of the breach, where he has the title, and for any reason refuses to convey it, as required by the contract. *Per* Mason, J.

VENDOR WHO CONTRACTS TO SELL AND CONVEY LAND IS LIABLE TO VENDEE IN NOMINAL DAMAGES ONLY, for breach of contract, where he contracts in good faith, believing he has a good title, and afterwards, on discovering his title to be defective, for that reason refuses or is unable to fulfill his contract; but this rule should not in any degree be extended, but strictly limited to those cases coming exactly within it. *Per* Mason, J.

VENDOR WHO CONTRACTS TO SELL AND CONVEY LAND MUST MAKE GOOD TO VENDEE LOSS OF BARGAIN, where he knows at the time that he had not the title or the power of conveyance, although he may have acted in good faith, and believed that he should be able to procure a good title for the vendee.

TO EXEMPT CONTRACTING PARTY FROM PERSONAL RESPONSIBILITY, HE MUST SO CONTRACT as to bind those he claims to represent; and the fact that he describes himself as "trustee" in signing the contract does not relieve him, or change the effect of his agreement.

ACTION to compel the specific performance of a contract to convey land, or to recover damages for refusal to convey. The contract in question was entered into June 13, 1849, between the defendant, Philip Phelps, and the plaintiff's testate, Elizabeth Brinckerhoff; and by it Phelps agreed to sell and convey the land at a certain price per acre, "to be surveyed at the expense of the estate for which I act as trustee," and was signed "Philip Phelps, trustee, etc." Elizabeth Brinckerhoff paid a portion of the purchase-money upon the execution of the contract, and upon the completion of the survey tendered the balance of the price, and demanded the deed. Phelps refused to comply with the demand, for the reason that Catharine W. Van Rensselaer, for whom he held the land in trust, would not give her consent to the conveyance. The deed of trust only gave Phelps power to convey upon the written assent of Mrs. Van Rensselaer. Mrs. Van Rensselaer had

previously told Phelps that he need not consult her about the sale of any of the lands belonging to the trust estate, but to confer with her husband, and to what they should agree upon she would give the required consent. She had assented to sales thus made of several other parcels of land, and Phelps believed she would assent to the sale in question, but she refused for certain personal reasons. Finding that he could not persuade her to execute the deed, Phelps afterwards, with her assent, sold and conveyed the land to another. At the commencement of the action, Phelps offered to pay back the purchase-money paid and costs. The circuit justice before whom the case was tried held that the plaintiffs were entitled to recover the difference between the value of the land and the contract price, and directed a verdict accordingly, subject to the opinion of the court at general term. The general term affirmed the ruling, and the defendant appealed.

John H. Reynolds, for the appellant.

Samuel Hand, for the respondents.

By Court, MASON, J. There has never seemed to me to have been any very good foundation for the rule which excused a party from the performance of his contract to sell and convey lands because he had not the title, which he had agreed to convey. There seems to have been considerable diversity of opinion in the courts as to the grounds upon which the rule itself is based.

In England the rule seems to have been sustained upon the ground of an implied understanding of the parties, that the parties must have contemplated the difficulties attendant upon the conveyance. In the leading case on this subject of *Flureau v. Thornhill*, 2 W. Black. 1078, Blackstone, J., said: "These contracts are merely upon condition, frequently expressed but always implied, that the vendor has a good title." While in this country the rule is based upon the analogy between this class of cases and actions for breach of covenant of warranty of title: *Baldwin v. Munn*, 2 Wend. 399 [20 Am. Dec. 627]; *Peters v. McKeon*, 4 Denio, 546. The rule of damages in an action for a breach of covenant of warranty of title is settled to be the consideration paid, and the interest; and yet this is an arbitrary rule, and works great injustice many times; and the courts met with the greatest embarrassment in settling it. These difficulties were considered and well expressed in the leading case in this state of *Staats v. Ten Eyck's*

Ex'rs, 3 Caines, 115 [2 Am. Dec. 254], in which the court said: "To find a rule of damages in a case like this is a work of difficulty; none will be entirely free from objection, or will not, at times, work injustice. To refund the consideration, even with the interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion, where there has been no fraud, may also be attended with injustice, if not ruin. A piece of land is bought solely for the purpose of agriculture, and by some unforeseen turn of fortune it becomes the site of a populous city; after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which value the property might rise by causes unforeseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee?"

There is still another class of cases where the rule of simply refunding the purchase-money and the interest operates with great hardship and injustice upon the purchaser. A purchases of B a city lot, for the purpose of building himself a dwelling or buildings upon it, and takes from B a full covenant deed of the premises, covenanting to assure, warrant, and defend the title. The buildings are constructed at the cost of thousands of dollars, and then B is evicted by a paramount title, ascertained to be in some one else. The recovery of the money and six years' interest is not a very just or reasonable return in damages for the law to give to one who holds a covenant to make good and defend the title.

The reasons assigned for this rule, in actions for a breach of covenant of warranty of title, can scarcely apply to these preliminary contracts to sell and convey title at a future time. In the latter case, the vendee knows he has not got the title, and that perhaps he may never get it; and if he will go on and make expenditures under such circumstances, it is his own fault; and besides, these preliminary contracts to convey generally have but a short time to run, and there is seldom any such opportunity for the growth of towns, or a large increase in the value of the property, as there is in these covenants in deeds, which run with the land, through all time.

previously told Phelps that he need not consult her about the sale of any of the lands belonging to the trust estate, but to confer with her husband, and to what they should agree upon she would give the required consent. She had assented to sales thus made of several other parcels of land, and Phelps believed she would assent to the sale in question, but she refused for certain personal reasons. Finding that he could not persuade her to execute the deed, Phelps afterwards, with her assent, sold and conveyed the land to another. At the commencement of the action, Phelps offered to pay back the purchase-money paid and costs. The circuit justice before whom the case was tried held that the plaintiffs were entitled to recover the difference between the value of the land and the contract price, and directed a verdict accordingly, subject to the opinion of the court at general term. The general term affirmed the ruling, and the defendant appealed.

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The supreme court of the United States have refused to yield its sanction to this rule, when applied to contracts for the sale of lands, and affirm the doctrine that the reason of the rule, as to contracts for the sale of goods and chattels, applies with equal force to these executory contracts for the sale of lands: *Hopkins v. Lee*, 6 Wheat. 109. That rule is, where a party sustains a loss, by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed: *Robinson v. Harman*, 1 Ex. 850. This case of *Hopkins v. Lee*, 6 Wheat. 109, is cited with approbation in some of the American cases, and the rule there laid down affirmed.

These views are not presented to induce the court to overrule or repudiate the adjudged cases in our own courts, upon this subject. They reach back over a period of more than forty years, and have been too long sanctioned to be now repudiated.

I have referred to this matter, simply as furnishing an argument against in any degree extending the rule, and as a reason for limiting it strictly, where the already adjudged cases in our own courts have placed it. It becomes important, in this connection, to inquire what that limit is. The general rule certainly is, that where the vendor has the title, and for any reason refuses to convey it, as required by his contract, he shall respond in law for the damages, in which he shall make good to the plaintiff what he has lost by his bargain not being lived up to. This gives the vendee the difference between the contract price and the value at the time of the breach, as profits or advantages, which are the direct and immediate fruits of the contract: *Griffin v. Colver*, 16 N. Y. 489; *Durkee v. Mott*, 8 Barb. 423; *Underhill v. Gas Light Co.*, 31 How. Pr. 37; *Masterton v. Mayor etc. of Brooklyn*, 7 Hill, 61, 69 [42 Am. Dec. 38]. Where, however, the vendor contracts to sell and convey, in good faith, believing he has a good title, and afterwards discovers his title is defective, and for that reason, without any fraud on his part, refuses to fulfill his contract, he is only liable to nominal damages for a breach of his contract: *Baldwin v. Munn*, 2 Wend. 399 [20 Am. Dec. 627]; *Peters v. McKeon*, 4 Denio, 546; *Conger v. Weaver*, 20 N. Y. 140. The rule is otherwise, however, where a party contracts to sell lands, which he knows at the time he has not the power to sell and convey; and if he vio-

lates his contract in the latter case, he should be held to make good to the vendee the loss of his bargain; and it does not excuse the vendor that he may have acted in good faith, and believed, when he entered into the contract, that he should be able to procure a good title for his purchaser: 2 Parsons on Contracts, 503-505; *Hopkins v. Grazebrook*, 6 Barn. & C. 31; *Driggs v. Dwight*, 17 Wend. 74 [31 Am. Dec. 283]; *Bush v. Cole*, 28 N. Y. 261 [84 Am. Dec. 343]; *Lock v. Furze*, L. R. 1 C. P. 441; *Robinson v. Harman*, 1 Ex. 849; *Hill v. Hobart*, 16 Me. 164; *Fletcher v. Button*, 6 Barb. 650; *Trull v. Granger*, 8 N. Y. 115; *Hopkins v. Lee*, 6 Wheat. 109; *Burwell v. Jackson*, 9 N. Y. 535; *White v. Madison*, 26 Id. 124; *Lewis v. Lee*, 15 Ind. 499; *Dean v. Raseler*, 1 Hilt. 420; *Bitner v. Brough*, 11 Pa. St. 127; *McNair v. Crompton*, 35 Id. 23; *Wilson v. Spencer*, 11 Leigh, 261; *Graham v. Hackwith*, 1 A. K. Marsh. 429; Dart on Vendors, 447. This rule, applied to the case at law, sustains the judgment of the supreme court.

The defendant must be held personally liable on this contract. It is essentially his contract. In order to exempt the contracting party from personal liability, he must so contract as to bind those he claims to represent: *Moss v. Livingston*, 4 N. Y. 208; *Dewitt v. Walton*, 9 Id. 570; *Bay v. Gunn*, 1 Denio, 108; *Bush v. Cole*, 28 N. Y. 261 [84 Am. Dec. 343].

The fact that the party describes himself as trustee, without stating for whom, does not relieve him from personal liability, or change the effect of his engagement: *Taft v. Brewster*, 9 Johns. 334 [6 Am. Dec. 280]; *White v. Skinner*, 13 Id. 307 [7 Am. Dec. 381]; *Dewitt v. Walton*, 9 N. Y. 570; *Bush v. Cole*, 28 Id. 261 [84 Am. Dec. 343]. These views lead to the affirmance of the judgment.

GROVER, WOODRUFF, JAMES, and MURRAY, JJ., concurred with MASON, J., and were for affirmance.

DANIELS, J., dissented.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO CONVEY REALTY: See *Gerrard v. Dollar*, 67 Am. Dec. 271, and note discussing the question; *Foley v. McKeegan*, 66 Id. 107; *Old Colony R. R. v. Evans*, 66 Id. 394; *Welch v. Lawson*, 66 Id. 606; *Hall v. Delaplaine*, 68 Id. 57, and note; *Warner v. Bacon*, 69 Id. 253; *Herndon v. Harrison*, 69 Id. 399; *Beaupland v. McKeen*, 70 Id. 115. As a general rule, a vendee can recover only nominal damages for the breach of a contract for the sale of land by the vendor; but if he has paid part of the purchase price, he can recover the money back, with interest: *Margraf v. Muir*, 57 N. Y. 159. Nominal damages only can be recovered by a vendee where the vendor has entered into the contract in good faith,

believing that he has a good title: *Cockroft v. New York etc. R. R.*, 69 Id. 304; *Heimbury v. Ismay*, 3 Jones & S. 41; but where a vendor contracts to sell lands in which he knows at the time that he has no title, he is bound to make good to the vendee the loss of the bargain: *Mack v. Patchin*, 42 N. Y. 175; *Cockroft v. New York etc. R. R.*, *supra*; *Heimbury v. Ismay*, *supra*; and although the vendor acted in good faith, believing that he could procure and give the vendee a good title, he is liable for the difference between the contract price and the value of the land at the time of the breach of contract: *Margraf v. Muir*, 57 N. Y. 160; *Timby v. Kinsey*, 18 Hun, 256-258; but not where the vendee knew the vendor had no title and could get none: *Margraf v. Muir*, *supra*. The principal case is cited to the foregoing; but in the last case it is characterized as the widest departure from the general rule of damages that is to be found in the books. The principal case is also explained, with *Mack v. Patchin*, 42 N. Y. 167, *supra*, in *Burr v. Stenton*, 43 Id. 467, 468, as not changing the rule limiting a recovery by a grantee against his grantor, for a breach of the covenant of warranty, to the consideration paid, and interest, and for a breach of the covenant for quiet enjoyment in leases, to the advance rent paid; and it is cited in *Remington Paper Co. v. O'Dougherty*, 81 Id. 489, S. C., 11 Week. Dig. 77, to the point that, in an action against a vendor for breach of contract to convey, the fact that the title to a part of the land is in a third person is only material upon the question of damages; and in *Margraf v. Muir*, 57 N. Y. 159, to the point that it is competent for a party to set forth in his complaint a cause of action for specific performance of a contract to convey land, and a cause of action for damages for breach of the contract, in case it cannot be performed.

WORD "AGENT," "CASHIER," "TRUSTEE," ETC., IS, IN GENERAL, DESCRIPTIO PERSONÆ: *Johnson v. Catlin*, 62 Am. Dec. 622, and note; *Pierce v. Robie*, 63 Id. 614; *Eastern R. R. v. Benedict*, 66 Id. 389, and note; *Sayre v. Nichols*, 68 Id. 280; *Slawson v. Laring*, 81 Id. 750; *Bickford v. First National Bank*, 89 Id. 436; *Collins v. Buckeye State Ins. Co.*, 93 Id. 612; *Pease v. Pease*, 95 Id. 225. The addition of an official character to the signatures of executors and administrators in executing written contracts and obligations has no significance, and operates merely to identify the person, and not to limit or qualify the liability: *Schmittler v. Simon*, 101 N. Y. 558; S. C., 23 Week. Dig. 269; and where a draft is drawn upon "N. W. Day, agent Co-operative Brush Co.," and is accepted, "Nicholas W. Day, agent Co-operative Brush Co.," the company is not bound as acceptor: *Haight v. Naylor*, 5 Daly, 220, both citing the principal case; but the principal case was distinguished in *Bellinger v. Bentley*, 1 Hun, 565, S. C., 1 Thomp. & C. 74, on the ground that the contract was signed by the defendant simply as trustee, without anything in it to intimate of whom he was trustee; and explained in *Hood v. Hallenbeck*, 7 Hun, 366, in that the party gave no information for whom he was trustee, to the person with whom he contracted, nor did he show any authority to contract as trustee.

CRAIG v. PARKIS.

[40 NEW YORK, 181.]

ASSIGNMENT OF BOND AND MORTGAGE CARRIES WITH IT GUARANTY OF SAME, although the guaranty is not in terms assigned. The transfer of a debt carries with it, as an incident, all the securities for its payment. **GUARANTY OF COLLECTION IS UNDERTAKING BY GUARANTOR THAT DEBT WILL BE PAID**, if proper measures to collect it are taken within a reasonable time after it becomes payable.

GUARANTOR OF COLLECTION WILL BE DISCHARGED BY DELAY OF SIX MONTHS in taking measures to collect the debt, where all the principals reside in the state and can be personally served.

GUARANTOR OF COLLECTION WILL BE DISCHARGED BY UNREASONABLE DELAY in taking measures to collect the debt, notwithstanding that during the whole period the principals were hopelessly insolvent. Mason, Woodruff, and James, JJ., dissenting.

ACTION upon a guaranty. The facts are fully stated in the opinion, with the exception that the guaranties of Burgess and Herrick were indorsed on the bond, and the guaranty of Parkis on the mortgage.

George F. Danforth, for the appellant.

Sanford E. Church, for the respondent.

By Court, **LORT, J.** The defendant, by assignment, bearing date the twenty-eighth day of August, 1857, assigned to Orson Tousley a mortgage on real estate, in the state of Wisconsin, and the bond accompanying the same, executed by Frederick Root to Willard Herrick, and guaranteed the collection of the amount secured thereby as it became due, waiving all notice.

The bond and mortgage bear date the eighteenth day of August, 1857, and were given to secure the payment of the sum of three hundred dollars, with interest, in three equal annual payments of one hundred dollars each, with interest, the first of which was to be made on the first day of November, 1858. Indorsed on the bond was a guaranty by G. H. Burgess, dated August 24, 1857, guaranteeing the payment thereof, and the said Willard Herrick, by an assignment of the last-mentioned date, assigned the bond and mortgage to James Parkis, the defendant, or bearer, and also guaranteed the payment thereof. The said bond and mortgage, and all the right of Tousley in them, were afterwards assigned by him, on the third day of January, 1859, to A. L. Cady, and he assigned them, and all money due and to grow due thereon, as collateral security for a debt due from him to the plaintiff, by assignment dated February 1st of the same year.

On the fifth day of April following the plaintiff commenced an action in the supreme court of this state against Herrick, on his guaranty, which was duly prosecuted to judgment, and an execution issued thereon was returned wholly unsatisfied.

Subsequent to the return of the execution, and on the fifteenth day of November, 1859, a suit for the foreclosure of the mortgage was commenced in the circuit court of the state of Wisconsin against Frederick Root, in which a decree for the sale of the mortgaged premises, and for the payment of any deficiency, was entered on the tenth day of May, 1860.

The property was sold on the first day of October, 1860, and the sum of one dollar, over and above the costs, was realized from such sale and credited on the decree.

An execution for the collection of the deficiency was issued on the fourth day of December, 1860, and afterwards returned wholly unsatisfied. On the fourth day of May, 1861, an action was commenced by the plaintiff in the supreme court of this state against the said Burgess, on his guaranty, in which judgment was rendered on the sixth day of July thereafter, for the whole amount payable on the said bond, and on the thirteenth day of the month of May an action was commenced by the plaintiff in the supreme court of this state against Frederick Root, the mortgagor, in which judgment was also recovered on the said sixth day of July, for the whole amount due. Executions on both of the last-mentioned judgments were issued on the 9th of the same month, and were each returned wholly unsatisfied before the commencement of the present action.

After these facts were proven, the plaintiff offered to prove that at the time the first installment of the bond became due, November 1, 1858, the said Frederick Root, William Herrick, and E. H. Burgess were and have ever since been, each of them, entirely and hopelessly insolvent, and that nothing could have been collected of them by proceedings at law then or since.

The court excluded that evidence, and then, no further evidence being introduced, a nonsuit was ordered.

The motion for the nonsuit was based on three grounds: 1. That the proofs did not show the guaranty in the suit to be owned by the plaintiff; 2. That it did not appear that the plaintiff had used due and proper diligence in the prosecution of the principal debtor and the several guarantors; 3. That there were not sufficient facts stated in the complaint to constitute a cause of action.

The first ground for the nonsuit will be first considered. Although the guaranty of the defendant was not, in terms, assigned to the plaintiff, he became entitled to the benefit of it, under the assignment of the bond, and the money secured thereby. The transfer of the debt to him carried with it, as an incident, all the securities for its payment. He therefore had a right to maintain the action.

The exception to the exclusion of the evidence offered, and the other grounds of the motion for a nonsuit, present substantially the same question, and that involves the construction of the defendant's contract.

He guaranteed the collection, and not the payment, of the amount secured by the bond and mortgage, when it became due.

The mere fact of its non-payment at that time was therefore not sufficient to give the plaintiff the right of action. He was bound to take proper measures to collect the debt within a reasonable time after the whole of it became payable, conceding, for the present, that such duty did not arise on the previous defaults.

His obligation will be first considered, on the assumption that all of the parties liable were then able to pay, and that such ability continued for six months thereafter.

The last installment became payable on the first day of November, 1860, and legal proceedings could have been immediately taken against Root, the obligor, on his bond, and against Burgess and Herrick, the previous guarantors, on their guaranty of payment. None were, however, taken, until in May, 1861, and then only against Root and Burgess.

A judgment had previously been recovered against Herrick for the penalty of the bond after default was made in the payment of the first installment, and assuming that no further suit against him was necessary, that did not dispense with the necessity of issuing an execution after the other installments became payable.

It also appears by the case that all of the debtors, at the time of the recovery of the judgment and the issuing of the executions against them, resided in this state, and there is nothing to show that either of them was at any time a non-resident, or that a suit could not have been commenced against them by a personal service of the summons. A delay for upwards of six months was, under the assumption of the solvency of the parties, not the exercise of proper and due diligence.

Does their insolvency excuse that delay?

I see no principle upon which that can be claimed.

When a creditor agrees with a surety for his debtor that he will commence a suit against such debtor within a reasonable time after the debts fall due, and in default thereof that the surety shall be released, it is a condition precedent to his right of action against the guarantor that such suit shall not only be so commenced, but that it shall be carried to consummation.

The plaintiff had no right to determine, on his own responsibility, whether the debt was collectible. That was a question which the defendant had made it incumbent on him to ascertain by recourse to the ordinary rules provided by the law for the collection of debts.

If the debtor's insolvency is an excuse for the delay at all, there is no reason why it should not be such as long as the insolvency continues, and thus the liability of the surety would be for an indefinite period controlled by the opinion of witnesses as to the ability of the principal to pay the debt, and not by the standard or means fixed by the parties themselves for ascertaining that fact.

These views lead us to the conclusion that the proof of the debtor's insolvency was properly rejected.

It follows, therefore, that the nonsuit was proper, and that the judgment should be affirmed, with costs.

MASON, J., dissenting. There has been a very great deal of discussion, in the courts of this country, as to the legal construction of such a guaranty as this. The real difference of opinion has been as to what was implied in such a guaranty. All agree that, unless the terms of the guaranty imply that the liability of the guarantor depends upon the failure to obtain payment of the principal, by proceedings at law, such proceedings are not a condition precedent. In most of the states it has been regarded as an undertaking to pay, if recompense could not be obtained of the principal debtor; and that where clear proof of the principal debtor's insolvency could be made, no suit against him was required. The following cases will be found to hold this: *McDoal v. Yeomans*, 8 Watts, 361; *McClurg v. Fryer*, 15 Pa. St. 293; *Bull v. Bliss*, 30 Vt. 127; *Dana v. Conant*, 30 Id. 246; *Perkins v. Catlin*, 11 Conn. 213 [29 Am. Dec. 282]; *Ranson v. Sherwood*, 26 Id. 437; *Sanford v. Allen*, 1 Cush. 473; *Gillighan v. Boardman*, 29 Me.

79; *Thompson v. Armstrong*, 1 Breese, 23; *Wren v. Pierce*, 4 Smedes & M. 91; *Huntress v. Patten*, 20 Me. 28. The rule with us seems to be different.

The rule to be deduced from the adjudged cases in this state is, that such a guaranty is an undertaking that the demand is collectible by due course of law, and that the guarantor only undertakes to pay, when it is ascertained that it cannot be collected by suit, prosecuted to judgment and execution against the principal; and that the endeavor to collect of the principal, by due course of law, is a condition precedent to the right of action against the guarantor: *Moakeley v. Riggs*, 19 Johns. 69 [10 Am. Dec. 196]; *White v. Case*, 13 Wend. 543; *Eddy v. Stanton*, 21 Id. 255; *Taylor v. Bullen*, 6 Cow. 624; *Burt v. Fowler*, 5 Barb. 501; *Loveland v. Shepherd*, 2 Hill, 139; *Manning v. Haight*, 14 Barb. 76; *Newell v. Fowler*, 23 Id. 628; *Van Derveer v. Wright*, 6 Id. 547; *Gallagher v. White*, 31 Id. 92; *Cady v. Sheldon*, 38 Id. 102. It must be admitted, also, that the decided weight of authority, in the supreme court of this state, is, that a still further condition is implied in such a guaranty, and which is, that due diligence must be used in bringing the suit against the principal, and in prosecuting the same to judgment and execution; and that any laches in this respect will discharge the surety: See cases above cited.

I cannot find that this question has ever been passed upon in this court or in the late court of errors. But as a general rule its soundness cannot be doubted, I think, and it seems unquestioned from the adjudged cases. The rule which requires the creditor, in such case, to use due diligence to collect the debt of the principal, is just and reasonable, and should be enforced as well for its reasonableness as for the unbroken current of authority with which it is supported. The rule is not, however, in my judgment, inflexible. It is like most general rules,—it has its exceptions. It cannot be maintained upon principle, as the unbending rule, under all conceivable circumstances. If the principal debtor is and has been, from the time the right to bring suit against him has accrued, utterly and hopelessly insolvent, with no property out of which anything could be collected, then the reason of the rule which requires the principal debtor to be prosecuted to judgment and execution with all diligence ceases, and the familiar maxim of the law, *Cessante ratione legis, cessat ipse lex*, steps in and relieves the creditor from the rule of diligence in prose-

cuting his suit. The reason of the rule ceasing, the rule itself must cease. This must be so, unless we are prepared to hold that the creditor should lose his debt for the want of due diligence in doing a vain, idle, and useless thing.

The law is said to be the perfection of human reason, and should not be subject to such a reproach. Is it insisted that the judgment and the issuing and return of an execution *nulla bona* is, under all circumstances, the best evidence of the debtor's inability to pay? If it is, it cannot be maintained. His recent discharge under the bankrupt act of Congress, or under the insolvent laws of the state, on the petition of two thirds of his creditors, is better evidence of his insolvency than the sheriff's certificate upon the execution that he has no goods or chattels, lands or tenement. The one is preceded by a full and complete judicial investigation into the property and affairs of the bankrupt, and the certificate of discharge is only issued when the property of the debtor has been made over to the assignee for the benefit of the creditors. The other is the certificate of a ministerial officer, often made upon the very slightest investigation, and never more than *prima facie* evidence.

What the plaintiff offered to prove in the case at bar would have been quite as satisfactory evidence of the inability to collect anything of the principal debtor as the return of the sheriff upon an execution; and it seems to me more so. The plaintiff offered to prove that these principal debtors were at the time this debt fell due, and that each of them ever since had been, entirely and hopelessly insolvent, and that nothing could have been collected of them by proceeding at law then or since. This evidence was objected to, and rejected by the court. Under this ruling, we must hold that the creditor is compelled to proceed to judgment and execution against the principal debtors, where they are concededly, entirely, and hopelessly insolvent, and have nothing out of which the execution could be collected, and that he must do this with all diligence or lose his debt. There is no other principle upon which such a proposition can be maintained than that it is so provided in the bond, and that the party must stand to his contract. The argument must be that the condition of the guaranty made due diligence in such a case a condition precedent to the right of action against this guarantor. The decided weight of authority in the supreme court of this state is certainly to this effect. The rule, however, has been seriously

questioned by some of the judges in that court, and was distinctly repudiated in the recent case of *Cady v. Sheldon*, 3 Barb. 103. All that such a guaranty implies is, that the evidence of debt is good, and collectible by due course of law. The courts have said the law imposes this duty to prosecute the principal debtor with reasonable diligence; and this is for the purpose of insuring the collection of the debt out of the principal, and that no opportunity shall be lost to do so. This is very well, and is all right, as a general rule, as we have already said; but when the principal debtors are utterly and hopelessly insolvent, and have nothing out of which an execution could be collected, then the law excuses the want of diligence, as it would have been idle and useless in accomplishing any purpose whatever. Due diligence in prosecuting the principal debtor, who is proved to be utterly insolvent and without any property, should never be implied in such a guaranty as a condition precedent to the right of action against this guarantor. There is certainly no express undertaking of the kind in the contract of guaranty under consideration; and as none will be implied, it is not required. The terms "good and collectible," used in such a guaranty, mean nothing more than "capable of being collected": *Marsh v. Day*, 18 Pick. 321; *Sanford v. Allen*, 1 Cush. 474, 475. The rule which would require the creditor to prosecute with diligence in such a case a hopelessly insolvent debtor, without any property out of which to collect the same, ought not to obtain, for the further reason that it would be at war with the general analogies of the law.

The judgment of the supreme court should be reversed, and a new trial granted.

HUNT, C. J., and GROVER, MURRAY, and DANIELS, JJ., concurred with LOTT, J., for affirmance.

WOODRUFF and JAMES, JJ., concurred with MASON, J., for reversal.

Judgment affirmed.

ASSIGNMENT OF DEBT CARRIES WITH IT, AS INCIDENT, SECURITIES FOR ITS PAYMENT: *Peters v. Jamestown Bridge Co.*, 63 Am. Dec. 134, and note; *Perkins v. Sterne*, 76 Id. 72; *Herring v. Woodhull*, 81 Id. 296; *Pardee v. Lindley*, 83 Id. 219; *Bank of State v. Anderson*, 83 Id. 390; *Miller v. Rutland etc. R. R.*, 94 Id. 413; and see *Perry v. Roberts*, 95 Id. 689, and note. The principal case is cited to this effect in *George v. Tate*, 102 U. S. 571; S. C., 1 Trans. Rep. 406; *Barlow v. Myers*, 64 N. Y. 44; *Smith v. Starr*, 4 Hun 125; S. C., 6 Thomp. & C. 388.

GUARANTY OF COLLECTION IS UNDERTAKING THAT DEBT WILL BE PAID, if due legal proceedings to collect it are taken within a reasonable time after it becomes payable: *Moakeley v. Riggs*, 10 Am. Dec. 196; *Peck v. Frink*, 74 Id. 384; *Schmitz v. Langhaar*, 88 N. Y. 506, 512; S. C. below, 24 Hun, 171, per Gilbert, J., dissenting. It is a condition precedent that the creditor will diligently endeavor to collect the debt by exhausting the legal remedies: *Northern Ins. Co. v. Wright*, 13 Id. 168; *Griffith v. Robertson*, 15 Id. 246; *Vanderbilt v. Schreyer*, 21 Id. 540; *Rtper v. Poppenham*, 43 N. Y. 74; *Hernandez v. Stihwell*, 7 Daly, 363; and an unreasonable delay will discharge the guarantor: *Moakeley v. Riggs*, *supra*; *McMurray v. Noyes*, 72 N. Y. 526; S. C., 28 Am. Rep. 182; *Northern Ins. Co. v. Wright*, 76 N. Y. 448; *Toles v. Ades*, 91 Id. 572; *Tiffany v. Willis*, 30 Hun, 267; S. C., 17 Week. Dig. 397; *McFarlane v. City of Milwaukee*, 51 Wis. 696; and proof of insolvency, or inability of the principal to pay, will not avail as a substitute: *Northern Ins. Co. v. Wright*, *supra*; but see *Janes v. Scott*, 98 Am. Dec. 328. The question of reasonable diligence is one for the court, and not for the jury, where the facts are undisputed: *Bowery Nat. Bank v. Mayor etc. of New York*, 8 Hun, 229. The principal case is cited to the above propositions; but see it distinguished in a case where the payee of a promissory note neglected to proceed against the principal debtor upon the request of a surety, the principal debtor being insolvent: *Field v. Cutter*, 4 Lans. 196.

VALENTINE v. CONNER.

[40 NEW YORK, 248.]

LOAN IS NOT RENDERED PER SE USURIOUS from the fact that the lenders exacted, as a condition of making the loan, that the borrower should secure to them the payment of a subsisting and genuine debt due them from a third person.

IT WILL BE PRESUMED BY COURT OF APPEALS, IN SUPPORT OF JUDGMENT OF REFEREE, that he found such facts, in addition to those specified in his report, as are essential to sustain his conclusion, provided there was evidence to warrant the finding of such additional facts.

ACTION to cancel certain notes and a chattel mortgage to secure their payment, executed by the plaintiff to the defendants, and to recover the value of the property sold under the power in the mortgage, on the ground that the notes and mortgage were usurious. The action was tried by a referee, who found that about April 18, 1859, the plaintiff, being indebted to divers persons, including \$545.11 to the defendants, applied to the defendants for a loan of \$3,184.11, to discharge the indebtedness. The defendants consented to lend the money upon certain conditions as to the execution of notes; and upon the further condition that the plaintiff would, in consideration of such loan, undertake to pay to the defendants the sum of \$483.02, claimed to be due from one Henry Jones to them, by virtue of a judgment, interest thereon, referee's and counsel's

fees in supplementary proceedings on the judgment, and sheriff's fees on the sale of Jones's interest in certain property; and that the plaintiff would then and there make his promissory notes for said amount of \$483.02, the sum of \$545.11 then due and owing, and the sum of \$3,184.11, proposed to be loaned, and secure the same by a mortgage of certain personal property, used in carrying on the business of job printing. The plaintiff acceded to the terms, and made the notes and mortgage which he now seeks to cancel. The defendants afterwards took possession of the property mortgaged, and sold it under a power of sale contained in the mortgage. It appeared from the evidence, although omitted by the referee from his findings of fact, that the debt due from Jones to the defendants arose from the sale of certain personal property, and that this property, together with a large amount of other property, had been sold and transferred by Jones to the plaintiff about six months before the loan, under circumstances rendering it doubtful whether the sale was not fraudulent against the creditors of Jones. The defendants had recovered judgment against Jones on the debt, and had sold under execution a portion of the property which Jones had transferred to the plaintiff, and bid in the property at the sale. This property was some of that mortgaged. The defendants had declared their intention to enforce their claim to the property sold on execution, and were actually prosecuting proceedings for that purpose. There was also evidence of the insolvency of Jones. The referee concluded, as a matter of law, that the loan of money and the notes and mortgage were usurious and void; and that the plaintiff was entitled to recover the value of the property taken, less the sum of \$545.11, originally owing. Judgment was entered accordingly. On appeal by the defendants, the supreme court, at general term, reversed the judgment and ordered a new trial. The order failed to show that it was based upon any question of fact. The plaintiff appealed from this judgment of reversal and order granting a new trial, and agreed that if the order was affirmed, final judgment might be entered against him.

I. T. Williams, for the appellant.

S. T. Freeman and John K. Porter, for the respondents.

By Court, *Lott, J.* Assuming that the notes of the defendants were given to the plaintiff and accepted by him as a loan of money, the transaction, as found by the referee, cannot be

considered usurious. He has fully set forth the facts on which he found, "as a matter of law, that said loan of money and said notes given therefor, and the said mortgage, were usurious and void." They are substantially that the defendants, on an application to them by the plaintiff, for a loan of money to discharge an indebtedness by him to divers persons, including a debt to themselves, consented to lend the money wanted, among other terms, "upon the further condition that the said plaintiff would, in consideration of such loan, undertake to pay to the said defendants the sum of \$483.02, claimed by the said defendants to be due from Henry Jones to them, the said defendants," the particulars of which claim were set forth, "and then and there make his promissory note for said amount," and secure the same, with the notes to be given for the amount of the said indebtedness by the said mortgage, that the plaintiff acceded to the said terms, and made the notes and executed the mortgage which he seeks to cancel. He does not find as a fact, or set forth any circumstances warranting, or tending to warrant, the conclusion that the debt of Jones was not due, or that the assumption of it was demanded or insisted on in any way as interest for the loan, or with the intention of taking usury, or as a shift or device to cover it. The fact, and the only fact, on which, "as a matter of law," he decides the loan to be usurious and void is, that the defendants refused to make the loan asked by the plaintiff, unless the payment of the Jones debt was assumed by him and secured by the mortgage. Such a refusal did not *per se* make the transaction usurious, and that fact being, as before stated, the only one found, no other will be presumed to sustain a conclusion that the agreement was corrupt and void. It must be considered the settled rule of law in this state that the *onus* is upon the party seeking to avoid an agreement as usurious, not merely to establish a usurious intent, but to prove the facts from which that intent is to be deduced: *Thomas v. Murray*, 32 N. Y. 605, and cases cited at page 612.

A corrupt and usurious agreement will not be presumed from a fact which is equally consistent with a lawful purpose: *Booth v. Sweezy*, 8 N. Y. 280 et seq. "Where the conclusion of law drawn from the facts by the referee is erroneous, the judgment cannot be sustained, and it must appear that the facts found justify the judgment where there is an exception taken to the conclusion of law which the referee has drawn from the facts": *Smith v. Devlin*, 23 Id. 362.

In the case under consideration, the general term of the supreme court, on review of the findings of the referee, reversed his decision and ordered a new trial. That court on such review were not restricted to the facts found, but were authorized to examine the testimony, and reverse on the ground that it did not sustain those facts. They, however, did not reverse the judgment for that reason; but agreeing with the referee in his findings of fact, yet aided by the light of the circumstances, under which the assumption and security of the Jones debt was made a condition of the loan, they came to the conclusion that such condition did not make the transaction usurious, and reversed the judgment on that ground.

The facts on which the referee based his conclusion that the loan and the securities therefor were usurious did not *per se*, as before stated, constitute usury; and while those facts as found must be assumed by this court to have been warranted by the evidence, it may nevertheless be proper that such evidence should be referred to, as explanatory of the finding and for the purpose of properly construing its meaning and effect. By such reference it appears that the indebtedness of Jones to the defendants had arisen on the purchase by him, from them, of some of the identical property mortgaged, and that they claimed to be entitled to satisfaction of such indebtedness out of that property, and it, or a portion thereof, had in fact, at that time, been sold under an execution issued on a judgment recovered for that debt, and purchased by the defendants, notwithstanding the transfer thereof by Jones to the plaintiff, and the defendants had declared their intention to enforce such claim, and were actually prosecuting proceedings for that purpose. Those facts are sufficient to relieve the transaction from the taint of usury.

Assuming these views to be correct, the judgment entered on the referee's decision was properly reversed, and the judgment of reversal and the order granting a new trial must be affirmed with costs, and under the plaintiff's stipulation judgment final must be entered for the defendants, with costs.

GROVER, J. The facts found by the referee show that the plaintiff acquired the equitable title, at least, to the demands due from Jones to Conner. The referee did not find that Jones was insolvent, or that the debt, for any reason, could not be collected. The further finding of the referee, that the

respondents made it a condition of the loan to the appellant that he should secure to them its payment, and that the appellant, to procure the loan, did secure such payment to the Conners, did not warrant the legal conclusion that the loan was usurious: *Thomas v. Murray*, 32 N. Y. 605, and cases cited. It follows that the judgment ordered by the referee was not sustained by the facts found. The order of the general term, reversing the judgment, fails to show that it was based upon any question of fact. The code provides that, in such cases, it shall be assumed by this court to have been made upon questions of law only. Were we to look only at the facts found by the referee, the only conclusion to be drawn would be that the judgment was rightly reversed; but it has been repeatedly held by this court that it will be presumed in support of the judgment of the referee that he found such facts in addition to those specified in his report, as essential to sustain the judgment, provided there was evidence given to warrant the finding of such additional facts. The case shows that there was evidence given tending to show the insolvency of Jones, and in accordance with the above rule, it must be assumed that the referee found that fact.

The case further shows that Jones had, about six months before the loan, sold and transferred a large amount of personal property to the plaintiff, including the property sold by defendants to Jones, from which the debt against him arose, under circumstances rendering it doubtful, at least, whether such sale was not fraudulent against the creditors of Jones. It was further proved that the defendants had prosecuted their debt against Jones to judgment, upon which they had caused an execution to be issued and levied upon a portion of the property transferred by Jones to the plaintiffs, and the same to be sold, and had bid in the property upon such sale, and claimed to hold the same under the purchase. The evidence would not have sustained a finding that the defendants did not believe that they could hold this property, but on the contrary required a finding that they supposed they could hold it. If they could hold this property, there was no pretense but that it was ample for the payment of the debt against Jones. This property was, at the time of the loan, in the possession of the plaintiff, and the defendants' claim thereto effectually discharged by the transaction. Under this state of facts, usury could not be predicated upon the fact that defendants required the plaintiff to secure the payment

of the Jones debt: *Thomas v. Murray, supra*. Including the expenses of the supplemental proceedings against Jones with the debt was not usurious; Jones was liable for such expenses, and they could be satisfied from the property equally with the judgment.

The order appealed from must be affirmed, and judgment final given against the plaintiff.

MASON, J., in a dissenting opinion, held that as the order of reversal and granting a new trial by the supreme court at general term did not state that the reversal was on questions of fact, the judgment must, under the code, for the purpose of review by the court of appeals, be deemed to have been reversed purely on questions of law. Nothing but questions of law could, therefore, be reviewed by this court; and there was nothing to review but the law of the case arising upon exceptions taken upon the trial, and to the report of the referee, on his final decision of the case. In his finding of facts, the referee had omitted the very important element appearing from the undisputed evidence, of the insolvency of Jones, and that the defendants had failed to collect their judgment against him; but the mere omission to make a statement of all the facts which might be considered by this court as necessary or material to authorize the judgment afforded no ground for a reversal. The presumption was, that the referee found all the facts necessary to sustain his conclusion, although omitted to be stated, except where there was no evidence upon which any fact could have been found to justify the legal conclusion and the judgment. If the evidence was looked into, there was enough to sanction the judgment of the referee. The plaintiff was in depressed and embarrassed circumstances, and the assuming of Jones's worthless debt was imposed upon the plaintiff as a condition of the loan, and the transaction might well have been found usurious.

USURY, WHEN TRANSACTIONS ARE TAINTED WITH: See *Syloester v. Swan*, 81 Am. Dec. 736, and note; *Goodrich v. Reynolds*, 83 Id. 240; *Delano v. Wild*, 83 Id. 605; *Banks v. McClellan*, 87 Id. 594; *Price v. Lyons Bank*, 88 Id. 368; *King v. Cushman*, 89 Id. 366; *Fisher v. Anderson*, 95 Id. 761; *Drake's Ex'r v. Chandler*, 98 Id. 762. To render an agreement void for usury, there must be established a usurious intent in its making, and that must be shown by the party who sets it up: *Jones v. Power*, 16 Week. Dig. 231, citing the principal case. The principal case is also cited in *Clarke v. Sheehan*, 47 N.Y. 196, as an illustration of the proposition that there are numerous cases of the loan or forbearance of money on interest, in consideration of some collateral contract where the transaction has been held not to be usurious.

THE PRINCIPAL CASE IS CITED in *Whittaker v. Chapman*, 3 Lans. 167, to the point that when a finding by the court adversely to a fact claimed by the unsuccessful party is necessary to support the judgment, and the evidence warrants it, such adverse finding will be presumed; in *Bennett v. Agricultural Ins. Co.*, 15 Abb. N. C. 239, S. C., 20 Week. Dig. 210, to the point that undisputed facts sufficient to justify a finding appearing in the case, the court may infer, in support of the judgment, that the fact was so found; and in *Porter v. McGrath*, 9 Jones & S. 98, it is quoted to the effect that the supreme court, at general term, is not restricted to the facts as found below, but may look at all the evidence furnished in the case.

BURT v. DEWEY.

[40 NEW YORK, 282.]

WARRANTY OF TITLE IS IMPLIED in a sale of personal property in the possession of the vendor.

VENDOR OF CHATTEL CAN RECOVER NOMINAL DAMAGES ONLY FOR BREACH OF IMPLIED WARRANTY OF TITLE, where a judgment for the value of the chattel is recovered against him by the true owner, but the judgment is not satisfied.

ACTION to recover damages for the breach of an implied warranty of title to a horse. The plaintiff bought a horse of the defendant, and afterwards sold it. While it was in the possession of the plaintiff, it was identified as a horse which had been stolen from one Joseph Dysart a short time before. Dysart had recovered against the plaintiff for the value of the horse; but it did not appear that the defendant had any notice of the action, or that the judgment had been paid. A motion for nonsuit was sustained, on the ground that the judgment had not been paid, the plaintiff waiving all claim for nominal damages. The supreme court, at general term, reversed the judgment, and ordered a new trial. The defendant appeals.

E. H. Benn, for the appellant.

Smith, Robertson, and Fassett, for the respondent.

By Court, **JAMES, J.** The evidence was sufficient to show that the horse had been stolen from Dysart before he came to the possession of defendant, and therefore, as against Dysart, defendant and his vendees were without title.

In the sale from defendant to plaintiff, there was no proof of any express warranty of title; nor was any such proof necessary. The fair and reasonable construction of the evidence is, that defendant had possession of the property at the time of sale, and transferred it to the plaintiff on his paying the purchase-money. Possession of personal property implies title, and in every case of the sale of personal property in possession there is an implied warranty of title in the vendor: 2 Kent's Com. 478; 2 Bla. Com. 451; *Defreeze v. Trumper*, 1 Johns. 274 [3 Am. Dec. 329]; *Rew v. Barber*, 3 Cow. 272; 3 Bac. Abr. 323.

The important question in this case is, whether the plaintiff could recover without proving actual loss, or damage, by reason of defendant's want of title to the chattel. There was no

evidence that plaintiff or his vendees had ever been disturbed in their possession or enjoyment of the property; nor had plaintiff ever parted with any money or property in consequence thereof.

It is true, a judgment had been recovered against the plaintiff for the value of the horse; but, until satisfied, it only established a liability, not a loss. It might never be enforced. As the true owner was deprived of his property by a felony, he might pursue others, through whose hands it had passed, even the defendant, and satisfy his claim against them. Until a satisfaction, the owner's rights of action against others than plaintiff remained intact.

In its operation and legal bearings, this case is very like a covenant of warranty for quiet enjoyment in the sale of land. If A convey land to B, and B to C, and C to D, all with covenants of warranty for quiet enjoyment, and D is evicted, he may sue any or all of the preceding covenantors till he obtain satisfaction; but no intermediate covenantee can sue his covenantor till he himself has been compelled to pay damages upon his own warranty: *Withy v. Mumford*, 5 Cow. 137; *Baxter v. Ryerss*, 13 Barb. 281.

In the case of breach of an implied warranty of title to a chattel, the vendee is not bound to await legal action against him. If satisfied of the insufficiency of his vendor's title, and that the true owner would recover the property in an action, he may surrender it, and recover its value in an action against his vendor, by affirmatively establishing that the vendor was without title; or the vendee may await the prosecution of an action. If the vendor be notified of the action, and required to defend, a judgment, if obtained, would be conclusive as to his want of title; but if not notified, and judgment is obtained, the *onus* of showing want of title would rest upon the vendee, the same as if surrendered without action: *Sweetman v. Prince*, 26 N. Y. 224, 232.

If the property be surrendered to the true owner, then the vendee's loss and damage is established; but if a judgment be had against him, either with or without notice, the vendee's loss or damage is not established without proofs of satisfaction or payment of the judgment. In this case, the true owner (as in cases of covenants of warranty running with the land) would have a right of action against any possessor subsequent to the larceny; and that possessor against any prior covenantors, which might be pursued until this damage or

loss is satisfied; hence, any intermediate vendee or covenantor could not be permitted to maintain an action against his immediate warrantor or covenantor, in the absence of fraud, without proof of damage by loss of property or compulsory payment of money.

I think the plaintiff, on the trial, by omitting to prove payment of the judgment obtained against him, failed to establish a right of action as against the defendant, and hence was properly nonsuited.

The judgment of the general term should be reversed, and that of the circuit affirmed.

All the judges voting concurred.

MASON and MURRAY, JJ., did not vote.

Order of general term reversed, and judgment absolute for defendant.

WARRANTY OF TITLE IS IMPLIED ON SALE OF PERSONAL PROPERTY IN POSSESSION OF VENDOR: *Scott v. Hix*, 62 Am. Dec. 458, and note; *Long v. Hickingsbottom*, 64 Id. 118; *Faucett v. Osborn*, 83 Id. 278. The principal case is cited to this effect in *O'Brien v. Jones*, 15 Jones & S. 70; *Inness v. Willis*, 16 Id. 193; *Lister v. Windmuller*, 20 Id. 417; *McGiffin v. Baird*, 62 N. Y. 331. The warranty is likened to the covenant for quiet enjoyment in case of land: *McGiffin v. Baird*, *supra*; *O'Brien v. Jones*, 91 N. Y. 197; S. C., 16 Week. Dig. 252, both citing the principal case. But no warranty will be implied if the facts and circumstances of the sale indicate that the vendor did not intend to assert and sell the absolute title, but only an interest in the property: *O'Brien v. Jones*, 15 Jones & S. 70, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Bordwell v. Colbie*, 45 N. Y. 497, *Converse v. Miner*, 21 Hun, 374, to the point that a vendee of chattels may recover against his vendor upon a breach of warranty of title, upon surrendering possession to the true owner upon demand, but in such a case the burden of proof is with the vendee to establish the paramount title; and see *O'Brien v. Jones*, 91 N. Y. 197, 198; in *Atkins v. Hosley*, 3 Thomp. & C. 324, to the point that an eviction under a paramount title is all the proof necessary to entitle the vendee to recovery for a breach of warranty of title; in *O'Brien v. Jones*, 91 N. Y. 197, 198, to the point that where a vendee relies upon a breach of warranty of title, he must either restore the property to the true owner, or prove its loss under compulsory proceedings, or the payment of money voluntarily or through judgment obtained against him in answer to a claim made; in *Lister v. Windmuller*, 20 Jones & S. 419, as holding that where no damages had been actually sustained by the vendee, the recovery for breach of warranty of title would be nominal; and in *Andrews v. Appel*, 22 Hun, 433, to the point that if a payment is made by a grantee of land, in good faith, upon a valid and paramount claim, to avoid a loss of title and an actual eviction, the right of redress against the grantor is as perfect as though an actual eviction had taken place.

POTTER v. CROMWELL.

[40 NEW YORK, 237.]

PURCHASER OF REAL ESTATE AT EXECUTION SALE, WHO DETACHES FIXTURE, intermediate the sale and the giving of the sheriff's deed, is liable for its value, under the New York revised statutes, to the person only who eventually receives the deed; and if the purchaser himself receives the deed, no one can complain that he was injured by the detachment.

ANNEXATION OF ARTICLE FOR PURPOSE OF PERMANENT IMPROVEMENT OR, OR USE WITH, REALTY, RENDERS IT FIXTURE, where no different intention or purpose is manifested.

PORTABLE GRIST-MILL IS FIXTURE, as between a purchaser of the land at execution sale and a receiver appointed in supplementary proceedings against the judgment debtor, when it is connected with other machinery in the building by a belt, and is fastened to the floor by iron rods or bolts, and is capable of being removed by taking it apart without being injured or injuring the building, but is designed as a permanent structure for use as a custom grist-mill for the neighborhood.

ACTION brought by the receiver appointed in supplementary proceedings against one Charles E. Sowle, a judgment debtor, for the conversion by the defendant, a purchaser of realty at execution sale, of a portable grist-mill. Several judgments had been recovered by a number of persons against Sowle, and executions were issued on two of them, and levied upon about four acres of land, on which was erected a building used as a grist-mill and tannery. The defendant became the purchaser of the property at execution sale, and with the consent of the judgment debtor sold and detached from the building the portable grist-mill in question. The defendant subsequently received the sheriff's deed of the premises. The plaintiff was appointed receiver in supplementary proceedings instituted by another judgment creditor, and claimed the property removed. The issue was referred to a referee, who reported in favor of the plaintiff for the value of the mill. The facts found by him are stated in the opinion. The supreme court, at general term, affirmed the judgment, and the defendant appealed.

John Ganson, for the appellant.

Stephen Lockwood, for the respondent.

By Court, DANIELS, J. The referee held that the portable grist-mill, for which the plaintiff was permitted to recover in this action, was not a part of the real estate at the time of the sale made by the sheriff, but that it was personal property. Whether or not he was correct in this conclusion is the sub-

stantial point which is involved in the present appeal; for as the defendant became the purchaser of the real estate at the sale made by the sheriff, and afterwards received a deed conveying the fee to him, he would not be liable to the plaintiff for the removal and sale of the mill, if that was so affixed as to have become a portion of realty itself. When he received the deed, it conveyed to him the title which the defendant had in the land at the time of the sale. And if at that time the mill was a portion of the land, by reason of the manner in which it had been attached to it, the deed necessarily conveyed the title to it to the defendant. The statute expressly gives this effect to deeds made upon the sale of lands under executions: 3 R. S., 5th ed., 655, secs. 78, 79; *Thomas v. Crofut*, 14 N. Y. 474; see also *Babcock v. Utter*, 1 Keyes, 408, 409. No right of action, therefore, accrued to the plaintiff out of the detachment and sale of the mill, if it was so attached to the land as to constitute a fixture at the time of the sale by the sheriff. If the defendant had not afterwards acquired the legal title, he would have been liable to the person who did acquire it, if the mill formed a part of the land conveyed. This right of action is secured by the statute to the person afterwards deriving the title to the land under the sale, and to no other person. And as the defendant was the person who made the detachment, and afterwards received the title, of course the act would be necessarily justified by the law, because it would then only affect the removal and disposition of what was his own property. Neither the plaintiff, nor the judgment creditor represented by him, acquired any interest in the land, and they therefore have no reason to complain that it was injured by the detachment.

But the plaintiff maintains that this mill was no part of the land, and that it did not pass to the defendant by the sale and conveyance of the land to him. In order to determine this point, it will be necessary to ascertain the facts which led the referee to the conclusion finally mentioned in his report. As those facts are found by him from the evidence, and are contained in his report, it appears that the judgment debtor became the owner of the land in 1847. At that time there was a frame building upon it, about thirty by sixty feet in size, which stood upon a stone foundation, and was used as a tannery. In 1852, he made an addition to the building, which so far increased it in size as to render it sixty feet square. He then also put up a steam-engine and boiler in the basement of the

building to run a bark-mill for the tannery. In 1858, he put a portable grist-mill into the building for grinding flour, two bolts for wheat and buckwheat, a smut-machine, five sets of elevators, and the necessary shafting for applying the power. The grist-mill and machinery were put upon the main floor of the building, the mills and bolts in one room, and the smut-machine in another. The power was supplied by the engine, by means of shafting and belts. The portable grist-mill had been previously used in another mill, and from there was taken to the premises of the judgment debtor. It was built at a factory, ready for use, and was made in such a manner as to be readily taken apart without injuring it, and moved from one place and set up in another. The mill consisted of a heavy frame of timber, containing the mill stones, the lower one being stationary. Its only connection with the other machinery in the building was by a belt, passing over a drum in the frame and around the shafting, supplying the power to it. The mill stones were about two and a half feet in diameter, eight or ten inches in thickness, and weighed about one ton. It was fastened to the building by placing two sticks of timber parallel with each other upon the floor, as far apart from each other as the width of the mill frame, and extending from one side of the room to the other. Then the mill, in its frame, was set upon these cross-timbers, and iron rods or bolts, provided with screws, nuts, and washers, were run down through the frame timbers, the cross-sticks, the floor joists, and through corresponding cross-sticks under the floor joists, supported by upright posts resting on the cellar bottom, or set in the ground. The nuts at the ends of the rods, being screwed on and tightened, the mill was thus held firm in its place.

After finding these facts, the further fact was found by the referee that when these mills were so as aforesaid put in by the judgment debtor, he designed them as a permanent structure for use as a custom grist-mill for that neighborhood. This conclusion appears to include, not only the portable mill itself, but also the additional machinery placed in the building with it, in the fall of 1858. When the mill was taken out of the building, it was done by taking it apart, and without being injured or injuring the building. From these facts, the referee concluded that the mill continued to be personal property during all the time it remained in the building. And, as such, it did not pass to the defendant under the sale and the conveyance of the land itself.

The mill clearly appears to have been very firmly and securely attached to the building by means of the rods passing through the timbers of the frame, and those placed under it upon the floor, the joists upon which that rested and the timbers under the joists, and the nuts and washers on the lower ends of the rods. It was attached in this manner, not for the purpose of steadying it and keeping it in its place, as the looms were shown to have been in the case of *Murdock v. Gifford*, 18 N. Y. 28, but for the purpose of being used as a permanent structure, for a custom grist-mill for the neighborhood. In this respect, therefore, there is an essential difference between the circumstances upon which it was then decided that the looms were not so attached to the building as to become a part of the realty and those presented by the present case. This difference was regarded as important in the opinion delivered upon that occasion. Johnson, C. J., who delivered it, said that "the looms in question were merely placed on one of the floors of the factory, and were fastened to the floor by means of ten screws in each loom," as the case states, "merely for the purpose of keeping the said looms in their places, and in a steady position, and not otherwise, during the operation and working of the said looms." The case, by construction, expressly negatived the idea that the looms were attached to the building for the purpose of rendering them a part of it. No such intention could have existed, as they were attached to keep them steady and in their places, and not otherwise. While in this case, it was expressly declared that the mill was put into the building with the design of the person putting it there that it should be a permanent structure. All that was decided by that case was, that the looms, attached in the manner and for the purpose mentioned in it, still continued to be personal property, notwithstanding the attachment.

The same distinction exists between the present controversy and that presented by the case of *Vanderpool v. Van Allen*, 10 Barb. 157, where the articles were secured by cleats tacked to the floor to make them level. The object of the attachment excluded the intention of rendering them permanent fixtures. A similar circumstance distinguishes it from the decision made in *Farrar v. Chauffetete*, 5 Denio, 527, where it was shown that the machinery "was not affixed to the building, except so as to be detached from it without drawing nails or breaking bolts, pins, or other things; that it was put up for manufacturing

purposes, after the building was erected, with a view and in such a manner as to permit it to be detached and taken out at pleasure, without injury to the building or any portion of it." And important emphasis was placed upon this circumstance, in the decision made by the court. After referring to certain illustrations varying the application of the principle of law applicable to cases of this nature, the court added "that the principles applicable, as between vendor and purchaser, must vary with the varying circumstances of each case. The question of intention enters into and makes an element of each case. The circumstances are to be taken into account, to show whether the erections were made for the permanent improvement of the freehold, or for the temporary purposes of trade": *Id.* 531. And this principle was substantially applied in the same manner in the decision of the cases of *McKim v. Mason*, 3 Md. Ch. 186; *Gale v. Ward*, 14 Mass. 352 [7 Am. Dec. 223]; and *Swift v. Thompson*, 9 Conn. 63 [21 Am. Dec. 718]. The cases of *Ford v. Cobb*, 20 N. Y. 344, *Voorhies v. McGinnis*, 46 Barb. 242, rest upon a similar distinction, though created by different circumstances. The first was a sale of salt-kettles, which the purchaser bought to place in brick arches for the manufacture of salt. But before placing them there, he gave a chattel mortgage upon them to the seller, to secure the unpaid purchase-money. And this circumstance was held to be sufficient to so far control the nature and effect of the transaction as to render the kettles personal property, where it was substantially conceded they would have become a part of the realty, if it had not existed. Judge Denio, in delivering his opinion, said: "The kettles were originally personal property. The agreement contained in the chattel mortgage preserved their character as personalty, which would otherwise have been lost by their annexation. They therefore continued to be personal chattels, notwithstanding the annexation": *Id.* 352. Conceding, in substance, that the annexation of the kettles to the freehold would have rendered them a part of it, if the chattel mortgage given upon them had not removed the presumption otherwise arising out of their attachment: The case of *Voorhies v. McGinnis*, *supra*, was, to a very considerable extent, placed upon the effect of this decision; and so far as the engine and boilers were detached from the premises, when the chattel mortgage was given, was clearly within its control as an authority. If they had not been at that time detached, the court seems to have entertained doubts

as to whether they would not have properly fallen within the description of fixtures. That such would have been their character in that event is very clearly apparent, from the principle maintained in the case of *Ford v. Cobb*, *supra*: *House v. House*, 10 Paige, 158; *Merritt v. Judd*, 14 Cal. 59; *McGreary v. Osborne*, 9 Id. 119; *Richardson v. Copeland*, 6 Gray, 536 [66 Am. Dec. 424]; *Roberts v. Dauphin Deposit Bank*, 19 Pa. 71. Nothing existed in these cases to distinguish them from the ordinary rule, assuming an article to become a fixture from the circumstance of its annexation to the freehold. While in the others, circumstances did exist rendering that presumption inapplicable. For they led directly to the conclusion that the object of making the annexation was not the permanent improvement or beneficial enjoyment of the freehold. Where that is shown to have been the case, as it was in the attachment of the articles for the purpose of steadying or adjusting them merely, or where the intention actually existed at the time, which was not afterwards abandoned, that it should not be permanent in its character, or some agreement or relation appeared to exist inconsistent with the supposition that a permanent annexation was intended, as it did where the chattel mortgages were given, while the articles were personal property, and as is always found where the attachment is made by a tenant for the purposes of trade, then the mere attachment is insufficient to render the articles attached portions of the realty.

In the case of *Walker v. Sherman*, 20 Wend. 636, Cowen, J., entered into a very thorough and comprehensive examination of the authorities relating to what were, and what were not, fixtures. And that examination very clearly sustained the conclusion that simple annexation for the purpose of permanently improving the freehold to which it was made rendered the article annexed a fixture: Id. 651, 653, 654. He says that the ancient distinction, however, between actual annexation and total disconnection is the most certain and practical, and should therefore be maintained, except where plain authority or usage has created exceptions. The general importance of the rule, which goes upon corporal annexation, is so great that more evil will result from frittering it away by exceptions than can arise from the hardship of adhering to it in particular cases: Id. 656. This rule was recognized in the case of *Gardner v. Finley*, 19 Barb. 317. Also in *Buckley v. Buckley*, 11 Id. 43, where it was held that whatever is annexed or affixed to

the freehold by being let into the soil, or annexed to it, or to some erection upon it, to be habitually used there, particularly if for the purpose of enjoying the realty, or some profit therefrom, is a part of the freehold. In *Laflin v. Griffiths*, 35 Id. 58, it was held that it was the permanent and habitual annexation, and not the manner of fastening, that determined when the article annexed became a part of the realty. The same rule was in principle adopted in *Winslow v. Merchants' Ins. Co.*, 4 Met. 306 [38 Am. Dec. 368]; Shaw, C. J., stated it as follows: "In general terms, we think it may be said that when a building is erected as a mill, and the water-works or steam-works which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the conveyance, attachment, or mortgage attached to the mill, are yet parts of it, and pass with it by a conveyance, mortgage, or attachment."

In conformity with the same principle, that is, that annexation will constitute the article annexed to be a part of the realty, when no different intention or purpose is manifested, and it is made for permanent use with the realty or with some building erected upon it, the court held that dye-kettles, firmly secured in brick-work in a dye-house, were fixtures: *Noble v. Bosworth*, 19 Pick. 314. To the same general effect are the cases of *Butler v. Page*, 7 Met. 40 [39 Am. Dec. 757], and *Christian v. Dripps*, 28 Pa. St. 271. In *Walmesley v. Milne*, 97 Eng. Com. L. 114, machinery was held to be fixtures, because it was annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose. In *Crane v. Bingham*, 11 N. J. Eq. 29, the chancellor of New Jersey held that the permanency of the attachment "does not depend so much upon the degree of physical force with which the thing is attached as upon the motive and intention of the party in attaching it. If the article is attached for temporary use, with the intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor. If it is placed there for the permanent improvement of the freehold, he may": Id. 35. The same principle is also maintained by the cases of *Holla- well v. Eastwood*, 6 Ex. 295, 312, and *Lancaster v. Eve*, 94 Eng. Com. L. 717.

The law upon this subject is very correctly and succinctly summed up in the case of *Teaff v. Hewitt*, 1 Ohio St. 511, 529, 530 [59 Am. Dec. 634], where it was held that the true criterion

of a fixture is the united application of three requisites: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is appropriated; 3. The intention of the party making the annexation to make a permanent accession to the freehold. Each of which are shown by the report of the referee to have been found united in the present instance. And they bring this case within the stringent rule adopted by the courts of Vermont, requiring the intention to render the article a fixture by the act of annexation to be affirmatively made to appear: *Hill v. Wentworth*, 28 Vt. 428.

Under all the authorities, therefore, in this state, as well as elsewhere, this mill was a fixture. For it was annexed to the building erected upon the land, to be applied and appropriated to the business there to be carried on, with the design that it should be a permanent structure for use as a custom grist-mill for the neighborhood existing about it.

The statute providing what things shall be fixtures between the heir and personal representatives, where they have been annexed for the purposes of trade, has no necessary control over the controversy between these parties, for they sustain a relation which it was no part of its enactment to govern or define. Whether it should be so construed as to include all the cases that may be brought literally within its terms is a question, therefore, which is not necessary at this time to decide. That grave doubts have arisen upon this subject is apparent from what was said in the decision of the cases of *House v. House*, *Murdock v. Gifford*, and *Ford v. Cobb*, *supra*. No present necessity exists for attempting the solution of these doubts. The judgment entered in this case should be reversed, and a new trial ordered, with costs to abide the event.

FIXTURES, WHAT ARE AS BETWEEN VENDOR AND VENDEE: See *McLaughlin v. Nash*, 92 Am. Dec. 741, and note collecting prior cases.

CRITERION OF FIXTURE: See *McLaughlin v. Nash*, 92 Am. Dec. 741, and note referring to prior cases; *Kelly v. Austin*, 92 Id. 243; *Rogers v. Cross*, 93 Id. 299, 302; *Peck v. Batchelder*, 94 Id. 392; and particularly *Tessy v. Hewitt*, 59 Id. 634, and notes thereto. The tests of a fixture are,—1. Actual annexation; 2. Application to the use or purpose to which that part of the realty with which it is connected is appropriated; and 3. The intention to make the annexation a permanent accession to the freehold: *Voorhees v. McGinnis*, 48 N. Y. 282; *Hoyle v. Plattsburgh etc. R. R.*, 53 Id. 324; *McRea v. Central National Bank*, 66 Id. 496; *Funk v. Brigaldi*, 4 Daly, 361. The purpose of the annexation, and the intent with which it was made, are the most important considerations: *McRea v. Central National Bank*, 66 N. Y. 495, 499; and see S. C., 50 How. Pr. 53, 54. The law of intestament enters largely, and is

to a great extent controlling: *Wright v. O'Brien*, 5 Daly, 61; and if it was the intention of the owner of realty to permanently attach and use articles of personalty with the premises, they become fixtures: *Hart v. Sheldon*, 34 Hun, 45; S. C., 20 Week. Dig. 286; but if the intention of the vendor of lands be to retain, in chattels annexed thereto, their character as personal property, such intention will prevail: *Tyft v. Horton*, 53 N. Y. 383. The principal case is cited to the foregoing points. But in *Voorhees v. McGinnis*, 48 Id. 291, Gray, C., dissenting, did not concur in the suggestion of the principal case that annexation will constitute the article annexed a part of the realty, where no different intention or purpose is manifested; and he said the annexation was held to have been affirmatively established in the principal case, within the stringent rule mentioned in *Hill v. Wentworth*, 28 Vt. 248.

MACHINERY, WHEN FIXTURE: See *McLaughlin v. Nash*, 92 Am. Dec. 741, and note collecting prior cases. Machinery is a fixture when it is actually annexed to realty, and the annexation was actually made by the owner with the intention of making the machinery a permanent accession to the freehold: *Mutual L. Ins. Co. v. National Bank of Newburgh*, 18 Hun, 372; but where it is fastened to prevent it from moving, and not for the purpose of making a permanent accession to the freehold, it is personal property: *Wells v. Maples*, 15 Id. 92, both citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *Voorhees v. McGinnis*, 48 N. Y. 284, as reviewing the law on the subject of fixtures, so as to render it unnecessary to go over the cases in detail; in *Sisson v. Hubbard*, 10 Hun, 424, as in harmony with *Ford v. Cobb*, 20 N. Y. 344; and in *Funk v. Brigaldi*, 4 Daly, 361, as citing and adopting *Hill v. Wentworth*, 28 Vt. 428. In *McRea v. Central National Bank*, 66 N. Y. 497, it was said that the annexation in *Voorhees v. McGinnis*, 48 Id. 278, was much more complete than in the case at bar, or in the principal case. In *Voorhees v. McGinnis*, 48 Id. 287, it was also observed that the remark in the principal case, that the giving of a chattel mortgage on the property would alter its character, was not well advised, and could not be sustained upon authority. In the same case, at page 290, Gray, C., dissenting, observes that the principal case did not refer to 3 N. Y. R. S., 5th ed., 169, sec. 6, subd. 4, concerning fixtures; but in *McRea v. Central National Bank*, 66 N. Y. 495, it was remarked that the rule declared by this statute, as between the personal representatives and the heirs of a decedent, was not controlling between vendor and vendee.

LATHROP v. CLAPP.

[40 NEW YORK, 323.]

WITNESSES ON PROCEEDINGS SUPPLEMENTARY TO EXECUTION UNDER NEW YORK CODE ARE BOUND TO ANSWER ALL QUESTIONS concerning transfers of property by the judgment debtor, and particularly as to transfers made to the witnesses, and any questions seeking information as to whether such transfers were honest or fraudulent, and upon refusal to do so, may be punished as for contempt.

ORDER TO PUNISH WITNESS AS FOR CONTEMPT, IN REFUSING TO ANSWER IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION before a referee, may be made under section 302 of the New York code, by a judge out of court. *Murray, J., contra.*

PROCEEDINGS for contempt. The plaintiffs recovered a judgment against Marvin W. Clapp, and after the return of an execution unsatisfied, obtained an order from Supreme Justice Rosekrans, of the fourth district, requiring the judgment debtor to appear before Edgar Hall, Esq., as referee, and be examined concerning his property. The order also authorized the referee to examine on oath any witness that might be produced before him by the parties, and required the referee to reduce the examination to writing, and report the answers and examination to the judge. In pursuance to the order, Marvin W. Clapp was examined, and testified that he had sold his store and goods to his son, Theodore W. Clapp. The defendants in these proceedings, Benjamin Clapp and Theodore W. Clapp, were called as witnesses by the plaintiffs, but refused to answer, although required by the referee, as to the amount of property of Marvin W. Clapp, in what it consisted, to whom it had been transferred, whether they had received any of it, or for what consideration it had been transferred. The plaintiffs thereupon procured an order requiring these witnesses to show cause before Justice Rosekrans why they should not be punished as for a contempt in refusing to answer the several questions put to them, and for violating the order requiring the examination of witnesses, which were set forth in affidavits on which the order to show cause was procured. On the day named in the order, the defendants appeared, and defended on the ground that they were not required in law to answer the questions. The judge made a peremptory order fining them twenty-one dollars each, but the order did not state that the proceedings had been impeded, impaired, prejudiced, or defeated by the misconduct of the defendants. The general term affirmed the order, and the defendants appealed.

James Gibson, for the appellants.

N. B. Milliman, for the respondents.

By Court, MASON, J. I am of opinion, in this case, that the order of the supreme court can be affirmed without passing upon the question whether a witness, who is examined on proceedings under section 292 of the code, can be required to give evidence as to the consideration and good faith of a transfer of property to him after he has sworn there has been such a transfer made to him, and he is in possession and claims title.

These witnesses entirely refused to state what property this debtor had at the time, or what had become of it, or whether they knew anything about it, or whether they had received any of it, etc. They, in fact, refused to swear whether any transfer had been made by the debtor of his property, etc.

Be this as it may, however, they were in duty bound to answer all these questions, seeking information as to recent transfers of property by this debtor, and particularly as to transfers made to them, and any questions seeking for information as to whether such transfers were honest or not. In short, it was their duty to answer fully any question tending to disclose any property of this debtor, whether held by him or by a fraudulent transferee, who holds in fraud of creditors. I am aware that a different construction has been put upon the right of examination upon these proceedings, under this section 292. These decisions have given too much importance to section 299, which was never intended to regulate the examination, or in the least to intimate any rule by which it was to be conducted. The right of the examination, its object and scope, are all given by section 292 of the code. It is only necessary to give this section its full force to justify this fine upon these appellants. In the first place this section gives to the judgment creditor the order on making the proof required. "The order shall require such debtor to appear and answer concerning his property": Code, sec. 272.

It is simply absurd to say that this means he shall answer partially and not fully. Such a construction would stultify the framers of this statute. We have to consider for a moment the object and design of giving to the creditor this examination of the debtor, and any other witnesses he may produce to make this matter perfectly plain. Its primary object undoubtedly was to give the creditor the benefits of a discovery, as to the debtor's property; and in that respect, the legislature has not been guilty of the folly of saying you may have a discovery, but must not inquire into any fraudulent conveyances, or transfers of property, or any secret or fraudulent trusts created. There is no ambiguity in this language; it requires the debtor to answer concerning his property. If the terms were ambiguous, there should be such a meaning attached to the words used as is most suitable to the subject-matter of the act, for it is presumed they were intended to be used in accord with the general subject which law-makers had in view: Smith on Statutes, 631. The object in this act was to give a judgment

creditor, who had been unable to collect his debt by ordinary process of law, a relief in this summary way to discover his debtor's property, if any he have. This right of discovery was intended to be made full and complete, as is apparent from subsequent portions of the section. The section declares that "on examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as any other witness." And if there is any force in language, the legislature have intimated, in clear and unmistakable terms, this examination was not intended to be restricted as here claimed, but that the fullest scope was intended to be given to ferret out fraudulent transfers of property; else why did they close up the section by saying that "no person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment, or transfer of his property for any purpose; but his answer shall not be used against him in any criminal proceeding or prosecution." This enactment was undoubtedly made to give a more full examination than could be attained without it. It was to relieve the party and those very witnesses in this case from the pains and penalties which their evidence might otherwise tend to subject them. The only criminal frauds that I am aware of, that could reach a case like this, are those imposed by section 3, title 6, chapter 1, part 4 of the revised statutes: 3 R. S. 971, and 2 R. S., p. 133, sec. 39; the latter being section 26 of the non-imprisonment act of 1831. The former declares that every person being a party to any conveyance, or assignment of any estate or interest in lands, goods, or things in action, or of any rents or profits issuing therefrom, or to any charge on any such estates, interest, rents, or profits made or created with intent to defraud prior or subsequent purchasers, or to hinder, delay, or defraud creditors or other persons; and every person being privy to, or knowing of such conveyance, assignment, or charge, who should willingly put the same in use, as having been made in good faith,—shall, upon conviction, be adjudged guilty of a misdemeanor: 3 R. S., 5th ed., p. 971, sec. 3. Section 39 declares that "any person who shall remove any of his property

out of any county with intent to prevent the same from being levied upon by any execution, or who shall secrete, assign, or convey, or otherwise dispose of any of his property with intent to defraud any creditor, or to prevent such property from being made liable for the payment of his debts, and any person who shall receive such property with any such intent, shall, on conviction, be deemed guilty of a misdemeanor," etc.: 3 R. S., 5th ed., p. 133, sec. 39.

The rule contended for by the appellant in this case would convict the legislature of the absurdity of putting these clauses exempting the party and the witnesses from all use of their testimony in any criminal proceeding, or prosecution against them for fraudulently transferring or fraudulently receiving a transfer or conveyance with intent to hinder, delay, or defraud creditors, when the very same enactment of which this is a part, entirely forbids their being examined at all upon this subject. No construction of a statute should be allowed which leads to an absurdity; and it is familiar rule of construction that such exposition should be given to them, that every clause, sentence, or word, should be allowed to have some effect: Smith on Statutes, p. 710, sec. 575. No case could ever occur where these provisions of exemption could possibly be operative, if this act forbid any such examination, and consequently the provision itself would become a nullity. No rule of construction will allow us to give such effect to section 299 as to produce such a result. That section is not so inconsistent with these provisions in section 292 as to require any such construction. It is true, after the examination is through and it turns out that there has been a fraudulent transfer, and that the party has the property and claims to own it, the judge cannot set aside the sale, and order the property to be given over to the creditor; but the further proceeding to reach it must be through the appointment of a receiver and an action by such receiver. The court is authorized to appoint a receiver, and to make an order forbidding a transfer or other disposition of such property, till a sufficient opportunity be given to the receiver to commence such action and to prosecute the same to judgment and execution: Code, sec. 299. The inquiry is not fruitless, if the investigation shows there has been a fraudulent transfer, and the property is still in the hands of the purchaser; the creditor may issue his execution, and levy upon the same, and sell it to pay his judgment. If, on the other hand, the examination shows that the debtor has no property, and

that sale and transfer of the property was honest, he has no occasion for a receiver, and none will be appointed. The right to appoint and restrain the person claiming to hold the property until the receiver can bring his suit to reach the property, rather, to my mind, strengthens than weakens the construction which we have given to the scope of this examination, under section 292. This privilege which is given to have a receiver appointed, and the judge, by order, to restrain the person having and claiming the property from transferring or otherwise disposing of the property, would be of little avail to the creditor if these witnesses can be sustained in their claim in this case. If the mouth of all parties to a fraudulent transfer, and of all other witnesses to the transaction, is so effectually sealed by these provisions, the title had better be changed to "an act to sustain and protect fraudulent sales and conveyances." I am sustained in these views by the opinion of Judge Davies, in the case of *Sandford v. Carr*, 2 Abb. Pr. 462, and by the very satisfactory and able opinions of judges Rosekrans and Bockes, in this very case: *Clapp v. Lathrop*, 23 How. Pr. 424. This is said to be a kind of fishing operation on the part of the creditor, and not to be countenanced by the judges who administer the law. I have always supposed the old bill of discovery and for relief against the debtor was based upon the very sound theory that it was right and just for an honest creditor to fish a little after the property of a dishonest debtor, and that these proceedings supplementary to execution, under sections 292 and 294 of the code, were given as a more simple and less expensive mode of accomplishing the same thing.

There is no severity or hardship in the law which requires an honest debtor to make a full disclosure to his creditor as to his property, and how it is situated, and an examination which seeks that in behalf of an honest creditor should not be characterized as a fishing excursion.

So again, an honest purchaser or other transferee of the debtor's property should not be at all reluctant to explain to a creditor his purchase, and the circumstances of the transfer, as he will thereby, very likely, remove the suspicion of dishonesty, if any exist. The creditor has a right to be informed fully in regard to his debtor's property, and he ought not to be regarded as meddlesome or impertinent in seeking honestly for such information, and there is no doubt in my mind but this section 292 of the code secures this right fully to the creditor.

and that he may inquire into any recent transfers of property, both from an examination of the defendant himself, and any party to the transaction or other witnesses. There was no occasion to propound interrogatories to these defendants, as they did not deny anything of which they have been convicted; and, as they were before the judge, on an order to show cause, and had been served with the affidavits and order, and had full opportunity to answer, no case for interrogatories was presented: *Pitt v. Davidson*, 37 N. Y. 235. The order appealed from should be affirmed, with costs.

Since writing the above, my attention has been called to the question whether the judge had any jurisdiction to entertain these proceedings, to punish these parties for a contempt upon the ground that a judge at chambers could not entertain these proceedings. There are two answers to the objection. In the first place, the papers seem to show that the proceedings were before the judge in court, and as it is known that the judges in the fourth district are in the habit of keeping their special terms adjourned to their chambers for convenience of business, I presume that the proceedings, although transacted at the chambers of the judge, were in court. I conclude this was so from the order itself. The order is entitled in the supreme court, before Rosekrans, justice of the supreme court. It was certainly so understood by the judges of the supreme court who heard the appeal, and of which Judge Rosekrans was one, for on their order they say the order of special term is affirmed, with ten dollars costs.

There is another answer to this objection; section 296 of the code provides that the party or witnesses may be required to attend before the judge or referee. The order referring this matter to Edgar Hall, Esq., as referee, required the referee to examine the defendant, and any witnesses that may be offered on oath, and reduce such examination to writing, and report such answers and examination to the judge. The order requiring these parties to show cause states that they are required to show cause why they should not be punished for their misconduct in refusing to answer the several questions put to them, and for violating the said order set forth in said affidavit, which is the order requiring the examination of the witnesses, and reducing their answers and examinations to writing, and report the same to the judge; under the final order they are convicted of this contempt. Now, section 302 of the code provides that any person, party, or witness dis-

obeying an order of the judge or referee, duly served, such party or witness may be punished as for a contempt. In the first place, these witnesses were ordered to be examined, and their answers and examinations fully taken and returned, and they, after being sworn, refuse to give any answers. In the second place, they were ordered to and required by the referee to answer these questions, and disobeyed his order. It may be said that the papers do not show that the judge reduced this order to writing, and served it upon the witnesses, and therefore they cannot be punished as for a contempt by a judge out of court. I do not think such a construction should be given to this section. There is no sense in requiring a special order to be reduced to writing requiring the witness to answer every question which he may see fit to refuse, and then to go through the formality of serving the order on the witness. If this were done, no one can doubt the judge could punish for disobedience; for the very language of the section is, that the judge may punish any witness who shall disobey any order of the referee duly served.

The object and design of this section 302 of the code was to give full power to the judge to punish any witness for contempt of referee's orders, that a full and complete examination of the witness might be secured without a special application to the court to compel it; and, I think, when the referee orders the witnesses to answer to questions, that is a sufficient service, if the witness is present when the referee orders him to answer. The practice, I am sure, has been so understood, and it would be almost intolerable to require the referee to make 150, or 200, or any number of orders, in writing, requiring the witness to answer, and have them formally served upon the witness. Every statute should have a reasonable intendment, and receive a reasonable construction. I think the judge, out of court, had complete authority to punish these parties.

MURRAY, J., concurred in the opinion that a full examination should have been submitted to by the witnesses; but maintained that the order punishing for contempt could not be made under section 302 of the code. He was therefore of the opinion that the order should be reversed.

PROCEEDINGS SUPPLEMENTAL TO EXECUTION. — The inadequacy of the ordinary means of enforcing a money judgment by levy upon and sale of the property of the defendant has led to the very general adoption of proceedings supplemental to execution. In several of the states, these proceedings have come to occupy a very important position in the legal system, and have largely superseded the former equitable remedy by creditors' bills. The object and purpose of these proceedings is the discovery of the judgment

debtor's property, and its application to the satisfaction of the judgment: *Fint v. Webb*, 25 Minn. 263. They are intended to reach property not tangible to the levy of an execution: *Smith v. Weeks*, 60 Wis. 94. They are in the nature of a process of execution: *Gibson v. Gorman*, 44 N. J. L. 325. And they are regarded as being as much a means of enforcing the judgment as is the execution itself: *Emery v. Emery*, 9 How. Pr. 130.

NATURE OF PROCEEDINGS SUPPLEMENTAL TO EXECUTION. — These proceedings have sometimes been treated as special proceedings in New York: *Davis v. Turner*, 4 How. Pr. 190; *Campbell v. Foster*, 16 Id. 275; Freeman on Executions, sec. 395. Other cases have held that they were in their nature a new suit: *Griffin v. Domingues*, 2 Duer, 656; *Driggs v. Williams*, 15 Abb. Pr. 477. But they are more generally and properly regarded as proceedings in the original action: *Dresser v. Van Pelt*, 15 How. Pr. 19; *President etc. of Bank of Genesee v. Spencer*, 15 Id. 412; *Gould v. Torrance*, 19 Id. 560; *Allan v. Starring*, 26 Id. 57; *Seeley v. Black*, 35 Id. 869; *Mallory v. Gulick*, 15 Abb. Pr. 307, note; *Ross v. Chuseman*, 3 Sand. 676; *Wright v. Nostrand*, 94 N. Y. 31; Freeman on Executions, sec. 395. In *Wright v. Nostrand*, *supra*, the court of appeals held that proceedings against a debtor and the appointment of a receiver therein are in the nature of an action, and not a special statute proceeding, such as requires affirmative proof of the facts conferring jurisdiction upon the court or officer acting in the matter, and that the acts of the court or officer are entitled to all the presumptions of regularity belonging to proceedings in courts of general jurisdiction: See also *Arthur v. Hale*, 6 Kan. 161. The new code of New York classifies these proceedings as special proceedings, and the records thereof must now be filed where the records in other special proceedings are filed, that is, in the county clerk's office: *Fiske v. Twigg*, 50 N. Y. Super. Ct. 69. It is a question how far this mere change in the classification of the code will be held to modify the decision in *Wright v. Nostrand*, *supra*, and the other cases cited above: Riddle and Bullard on Supplementary Proceedings, 3d ed., 15. In California, these proceedings are not regarded as a new action, but as proceedings in the original action: *Collins v. Angell*, 72 Cal. 513. In North Carolina, South Carolina, and Wisconsin they are regarded in the same way: *McCaskill v. Lancashire*, 83 N. C. 393; *Kennesaw Mills Co. v. Walker*, 19 S. C. 104; *Barker v. Dayton*, 28 Wis. 367. In Indiana, the statute makes them a summary judgment creditor's action, and they are held to be independent of the action in which the judgment was rendered: *Pound v. Chatham*, 96 Ind. 342. In Alabama, a summons of garnishment is held to be a legal and not an equitable proceeding: *Thomas v. Hopper*, 5 Ala. 442; *Self v. Kirkland*, 24 Id. 276. And in Oregon, a proceeding against a garnishee is held to be a proceeding at law: *Williams v. Gallick*, 11 Or. 337.

SUBSTITUTE FOR CREDITORS' BILLS. — In nearly all of the states these proceedings supplemental to execution are regarded as a substitute for the creditor's bill of the chancery practice: *Adams v. Hackett*, 7 Cal. 187; *McOullough v. Clark*, 41 Id. 298; *Pacific Bank v. Robinson*, 57 Id. 520; S. C., 40 Am. Rep. 20; *Allen v. Fitch*, 5 Col. 226; *Hexter v. Clifford*, 5 Id. 168; *Figg v. Snook*, 9 Ind. 202; *Mason v. Weston*, 29 Id. 561; *Cushman v. Gephart*, 97 Id. 46; *Lynch v. Johnson*, 42 N. Y. 27; *Levy v. Kirby*, 51 N. Y. Super. Ct. 69; *Driggs v. Williams*, 15 Abb. Pr. 477; *Carter v. Clarke*, 7 Robt. 43; *Pope v. Cole*, 64 Barb. 406; *Sale v. Lawson*, 4 Sand. 718; *People v. Mead*, 29 How. Pr. 360; *Rand v. Rand*, 78 N. C. 12; *Coates v. Wilkes*, 92 Id. 376; *In re Remington*, 7 Wis. 643; *Graham v. La Crosse & M. R. R. Co.*, 10 Id. 469; *Petition of O'Brien*, 24 Id. 547; *Clark v. Bergenthal*, 52 Id. 103; *Smith v. Weeks*,

60 Id. 94. For a discussion of the subject of creditors' bills and proceedings in equity in aid of execution, see the note to *Massey v. Gorton*, 90 Am. Dec. 288-301.

WHETHER CREDITORS' SUITS ABOLISHED BY STATUTES AUTHORIZING PROCEEDINGS SUPPLEMENTAL TO EXECUTION.—In Wisconsin, it was held in *Graham v. La Crosse & M. R. R. Co.*, 10 Wis. 459, and in *Seymour v. Briggs*, 11 Id. 169, that the code of that state had abrogated actions in the nature of creditors' bills. But such actions were subsequently restored by chapter 308 of the laws of 1860; *Winslow v. Dousman*, 18 Id. 456; *Williams v. Sexton*, 19 Id. 42. In Colorado, it is held that, since the adoption of the codes, the remedies provided therein for subjecting the property of judgment debtors to the satisfaction of the judgment must be pursued, whenever adequate, and that a bill in the nature of a creditor's bill cannot be maintained in such a case: *Heater v. Clifford*, 5 Col. 168. And in Indiana it is held that proceedings supplementary to execution are to be confined to cases clearly within the provisions of the statute: *Burt v. Hostinger*, 28 Ind. 217.

But where proceedings supplemental to execution do not furnish an adequate remedy, it is generally held that they do not stand in the way of a creditor's suit, but that the latter may still be maintained in a proper case: *Swiff v. Arents*, 4 Cal. 390; *Parsons v. Meyburg*, 1 Duvall, 206; *Goodyear v. Smith*, 7 How. Pr. 187; *Catlin v. Doughty*, 12 Id. 457; *Gere v. Dibble*, 13 Id. 31; *Taylor v. Persee*, 15 Id. 417; *Bennett v. McGuire*, 58 Barb. 625; *Dunkam v. Nicholson*, 2 Sand. 636; *Quick v. Keeler*, 2 Id. 231; *Bartlett v. Drew*, 4 Lana. 444; *Freeman on Executions*, sec. 384.

HOW ENTITLED.—If these proceedings are regarded as proceedings in the original action, it is, of course, proper to entitle them in the same way as the judgment or execution to which they are supplemental. And in *Wright v. Nostrand*, 94 N. Y. 31, it was held to be proper for the receiver of a bank to sue out proceedings in the name of the judgment creditor, although it was defunct. And it seems that in New York, even since the code has classified these proceedings as special proceedings, the practice is to entitle them in the action in which the execution was issued: *Riddle and Bullard on Supplementary Proceedings*, 3d ed., 23.

ON WHAT JUDGMENTS MAY BE PROSECUTED.—These proceedings may generally be prosecuted upon any judgment for a specific sum of money: *Freeman on Executions*, sec. 396. They may be maintained on a judgment against an infant: *Lederer v. Ehrenfeld*, 49 How. Pr. 403; on a judgment against a lunatic who had a guardian duly appointed for him: *Blake v. Reepass*, 77 N. C. 193; on a judgment against a married woman: *Thompson v. Sargent*, 15 Abb. Pr. 452; *Clintcales v. Hall*, 15 S. C. 602; on a judgment recovered against an administrator on the final settlement of the estate of his intestate: *Rhodes v. Casey*, 20 Id. 491; on a judgment for costs only: *Davis v. Herrig*, 65 How. Pr. 290; to enforce the collection of interest and costs after the principal of the judgment has been paid: *Johnson v. Tuttle*, 17 Abb. Pr. 315; and to enforce a judgment rendered under the joint-debtor act, based upon service on one only of the defendants: *Emery v. Emery*, 9 How. Pr. 130; *Jones v. Lawlin*, 1 Sand. 722.

JURISDICTION.—In New York the present code provides that any judge of a court out of which an execution against both real and personal property may issue to a sheriff, or, where he is interested, to a coroner of the same county, can entertain these proceedings, whenever the requisite facts exist and are proved: *Riddle and Bullard on Supplementary Proceedings*, 3d ed., 98. A justice of the supreme court of that state may make the order inti-

tating any of these proceedings in any part of the state, and all proceedings therein, if on a judgment of his own court, may be had before him anywhere in the state, except the attendance and examination of the party proceeded against: *Id.* 27; *Crouse v. Wheeler*, 33 How. Pr. 337; *Bingham v. Disbrow*, 14 Abb. Pr. 251; S. C., 37 Barb. 24. These proceedings are carried on by a judge and not by the court. The court, as such, has no power to cite the defendant, or any one else, to appear, nor can it make any order necessary to be made in the course of the proceedings: *Freeman on Executions*, sec. 397; *Miller v. Rossman*, 15 How. Pr. 10; *Biting v. Vandenburg*, 17 Id. 80. A county judge acquires jurisdiction in these proceedings when an affidavit is presented to him, alleging the recovery of a judgment before a justice of the peace for twenty-five dollars or upwards, the filing of a transcript thereof in the county clerk's office, the issuance of an execution to the sheriff of the county where the debtor resides, and its return unsatisfied in whole or in part: *People v. Oliver*, 66 Barb. 570. In California the order for the debtor to appear and answer concerning his property must be made by the judge. But if the debtor is cited to appear because he is alleged to have property which he unjustly refuses to apply to the satisfaction of the judgment, the order may be made by the court or by a judge thereof. In other states various provisions are made on this subject: See *Freeman on Executions*, sec. 397. The voluntary appearance and examination of a debtor cannot give jurisdiction, where the facts disclosed by the affidavit of the creditor do not disclose a case within the statute: *Sackett v. Newton*, 10 How. Pr. 560; *De Comeau v. People*, 7 Robt. 498; *Carter v. Clarke*, 7 Id. 490. In *Wright v. Nostrand*, 94 N. Y. 31, it was held that an order appointing a receiver in these proceedings is to be presumed regular until annulled in a direct proceeding, and if it recites facts giving jurisdiction, it is *prima facie* evidence of the existence of those facts. The court will not presume loss of jurisdiction from the omission to show regular adjournments of the proceedings: *Id.*

WHO MAY INSTITUTE. — In New York, any person who is entitled to collect a judgment, in whole or in part, in his own name, may institute these proceedings: *Riddle and Bullard on Supplementary Proceedings*, 3d ed., 35. The statutes of the various states generally provide that these proceedings may be prosecuted by the judgment creditor. Any person, therefore, who answers this description may institute the proceeding. In New York, the assignee of a judgment may institute the proceeding, even though he became such assignee after the execution was returned unsatisfied: *Orr's Case*, 2 Abb. Pr. 457; *Frederick v. Decker*, 18 How. Pr. 96; *Crill v. Koenmayer*, 56 Id. 276; *King v. Kirby*, 28 Barb. 49; *Ross v. Clusman*, 3 Sand. 676. Where, at the time of his death, a judgment creditor was entitled to institute supplementary proceedings, his personal representative may institute them after his death: *Collier v. De Revere*, 7 Hun, 61; *Pardoe v. Tilton*, 20 Id. 76; S. C., 58 How. Pr. 476. And it is not necessary that the death of the creditor and the appointment of his personal representative should appear by affidavit. These facts may be made known in any way to satisfy the judge or officer: *Collier v. De Revere*, *supra*. A receiver of a corporation may institute these proceedings in the name of the corporation, even after it has ceased to exist: *Wright v. Nostrand*, 94 N. Y. 31. An attorney who has a lien on a judgment for his costs and fees may maintain these proceedings for the collection of the amount of his lien: *Riddle and Bullard on Supplementary Proceedings*, 37. In Mississippi, the assignee of a judgment could not prosecute proceedings supplementary to execution in his own name. Yet if the garnishee appeared and answered, and without objection allowed judgment to

be taken against him, it was held that such judgment would not be set aside: *McGill v. Bone*, 13 Smedes & M. 592. Creditors of the judgment debtor who are not parties to supplementary proceedings are not entitled to share in the benefits arising from the prosecution thereof: *La Fountain v. South Underwriters*, 79 N. C. 514.

WHERE PROCEEDINGS SHOULD BE INSTITUTED. — Proceedings supplemental to execution should be instituted in the county where the judgment debtor resides or has a place of business: *Jurgenson v. Hamilton*, 5 Abb. N. C. 149. An order in such proceedings should not direct the proceedings to be sent to any other county than that in which the examination is had: *Pardee v. Tilton*, 58 How. Pr. 476. In North Carolina it is held that the proceedings should be instituted in the county where the judgment was rendered, but the place where the defendant is required to appear and answer should be in the county of his residence: *Hasty v. Simpson*, 77 N. C. 69. Where the judgment was rendered in one county and docketed in another, the proceedings should be instituted in the county in which the judgment was rendered, as the action is pending in that county until the judgment is satisfied: *Hutchinson v. Symons*, 67 Id. 156. But in New York, the proceedings supplemental to execution may be prosecuted before a justice of the supreme court in a district other than in which the action was tried and the judgment entered: *Jacobson v. Doty Plaster Mfg. Co.*, 32 Hun, 436. In Indiana it was held that where the judgment debtor resided in the county where the judgment was obtained and the proceedings supplementary to execution had, a national bank situated in another county might be made a party, and required to answer as to funds of the defendant held by it: *O'Brien v. Flanders*, 41 Ind. 486.

WITHIN WHAT TIME. — These proceedings may generally be taken at any time within the lifetime of the judgment: Riddle and Bullard on Supplementary Proceedings, 3d ed., 76; Freeman on Executions, sec. 396; *Owen v. Dupignac*, 9 Abb. Pr. 180; *Miller v. Rossmann*, 15 How. Pr. 10. And the fact that, after the proceedings supplemental to execution are commenced, the judgment becomes barred by the statute of limitations, does not bar the proceedings: *Coates v. Wilkes*, 94 N. C. 174.

FACTS NECESSARY TO AUTHORIZE PROCEEDING TO OBTAIN DISCOVERY FROM DEFENDANT. — The facts necessary to authorize this proceeding are, the entry of a judgment, the issuance of an execution to the proper county, and its return wholly or in part unsatisfied. The issuance and return of the execution are indispensable: Freeman on Executions, sec. 399; *Chanute v. Martin*, 25 Ill. 63; *Kiser v. Sawyer*, 4 Kan. 503; *Owen v. Dupignac*, 9 Abb. Pr. 180; *Sackett v. Newton*, 10 How. Pr. 560; *McKeithan v. Walker*, 66 N. C. 93; *Hutchinson v. Symons*, 67 Id. 156; *Edgarton v. Hanna*, 11 Ohio St. 323; *In re Remington*, 7 Wis. 643; *Second Ward Bank v. Upmann*, 12 Id. 499. If, however, before the return day of the writ, the officer, after due search and inquiry, becomes satisfied that he cannot discover any property, he may return the writ before the return day, and such return will sustain the proceedings supplemental to execution, the return being made in good faith: *Livingstone v. Cleveland*, 5 How. Pr. 396; *Spencer v. Cuyler*, 17 Id. 157; S. C., 9 Abb. Pr. 382; *Fenton v. Flagg*, 24 How. Pr. 499; *Tyler v. Whitney*, 12 Abb. Pr. 465; *Tyler v. Willis*, 33 Barb. 327; *Second Ward Bank v. Upmann*, 12 Wis. 499. A fraudulent and collusive return may be set aside at the instance of the defendant: *Nagle v. James*, 7 How. Pr. 234; *Pudney v. Griffith*, 15 Id. 410; S. C., 6 Abb. Pr. 211; *Spencer v. Cuyler*, 17 How. Pr. 157; S. C.,

9 Abb. Pr. 392. But as long as the defendant allows the return to stand, he cannot attack it in the supplementary proceeding: *Forbes v. Waller*, 25 N. Y. 430; *Sperling v. Levy*, 10 Abb. Pr. 426; *Freeman on Executions*, sec. 399. The sheriff's return of an execution unsatisfied is conclusive evidence of the right of the judgment creditor to an order for the examination of his debtor, and its truth or falsity cannot be inquired into in proceedings supplemental to execution: *Flint v. Webb*, 25 Minn. 263; *Sherman v. Carville*, 73 Ind. 126. The fact that an *alias* execution has been issued, and not returned, does not affect the plaintiff's right to prosecute supplemental proceedings: *Farquharson v. Kimball*, 18 How. Pr. 33; S. C., 9 Abb. Pr. 385; *Seeley v. Garrison*, 10 Id. 460; *Gibson v. Haggerty*, 37 N. Y. 555; S. C., 97 Am. Dec. 752. An order for the examination of the judgment debtor may be made upon the return of a second execution unsatisfied, although issued more than ten years subsequent to the return of the first execution: *Levy v. Kirby*, 51 N. Y. Super. Ct. 69. Supplemental proceedings may be commenced before the sale of property levied upon, upon an affidavit or other proof of its insufficiency to satisfy the judgment. But no final order can be made appropriating the property discovered to the satisfaction of the debt until the property levied on has been exhausted: *McKeithan v. Walker*, 66 N. C. 95. The New York code does not justify these proceedings, where the execution has not been returned, because the sheriff has levied upon and is about to sell real property of the defendant: *Marx v. Spaulding*, 35 Hun, 478. In alleging the return of the execution unsatisfied, it is not enough to aver, in the words of the statute, that it was returned partly unsatisfied, but the amount remaining unsatisfied must be specified: *Douglass v. Maimzer*, 40 Id. 76.

AFFIDAVIT. — The facts necessary to the maintenance of the proceeding are generally brought to the knowledge of the court by filing an affidavit. The affidavit may be made by the plaintiff, or by his agent or attorney, or by some other person who is acquainted with the facts. When it is not made by the plaintiff himself, it must show that he who makes it has knowledge of the facts, and is not an intermeddler, but is acting for and by the authority of the plaintiff: *Freeman on Executions*, sec. 400; *Lindsay v. Sherman*, 1 Code Rep., N. S., 25; *Hough v. Kohlin*, 1 Id. 232; *Hawes v. Barr*, 7 Robt. 452. It is not necessary that the affidavit should show that the defendant has property subject to the execution: *Kay v. Vischers*, 9 Minn. 270; *Flint v. Webb*, 25 Id. 263; *Heroy v. Gibson*, 10 Bosw. 591; *Hough v. Kohlin*, 1 Code Rep., N. S., 232; *Conway v. Hitchins*, 9 Barb. 378; *Lindsay v. Sherman*, 1 Code Rep., N. S., 25; S. C., 5 How. Pr. 308; *Hatch v. Weyburn*, 8 How. Pr. 163; *contra*: *Hutchison v. Symons*, 67 N. C. 156; *Jones v. Lanolin*, 1 Sand. 722. It should show the amount then due on the judgment. But a failure to state this, though a ground for vacating the order, does not deprive the court of jurisdiction: *Douglass v. Maimzer*, 40 Hun, 75. It should show that the debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, and it will be considered defective if it fails to show that an execution was issued within the time allowed by the statute: *Hulson v. Weld*, 38 Id. 142. An affidavit that the judgment debtor is indebted to the plaintiff in a sum exceeding ten dollars, to wit, one hundred dollars, is sufficient to give the officer jurisdiction to grant an order of examination: *Davis v. Herrig*, 65 How. Pr. 290. An *ex parte* affidavit of the judgment creditor that an execution has been returned unsatisfied is sufficient proof to authorize the granting of the order of examination: *Conway v. Hitchins*, 9 Barb. 378. An affidavit which states, as ground for the examination, "that as deponent is informed and believes the said defendant has property which

he unjustly refuses to apply towards the satisfaction of the judgment," is insufficient to authorize the granting of the order. It should give the name of the deponent's informant, with his means of knowledge, and describe the property, and also allege a demand: *Manken v. Pape*, 65 How. Pr. 453. The affidavit must show that the property which is sought to be reached in the proceeding exceeds in value the amount exempt by law, and an averment therein that the property "is not exempt by law" is insufficient: *Abell v. Riddle*, 75 Ind. 345. Under the California code, it is held that after an execution has been returned unsatisfied, the judgment creditor is entitled to an order directing the judgment debtor to appear and answer concerning his property, without making any affidavit therefor: *Collins v. Angell*, 72 Cal. 513. And such an order is not void, because the affidavit of the judgment creditor upon which it was issued was not filed until the filing of the report of the referee, if the debtor, after being served with the affidavit and order, appears before the referee and submits to examination without objection: *Id.* The affidavit is not defective in omitting to state the nature of the relief sought: *Knight v. Nash*, 22 Minn. 452. But it should state the names of the parties to the judgment, the amount thereof, the court in which it was rendered, the date of its rendition, the court or officer with whom the judgment roll is filed, that execution was issued to the proper county, and that it has been returned wholly or in part unsatisfied: *Freeman on Executions*, sec. 400; *Hinsdale v. Sinclair*, 83 N. C. 338. Defects in the affidavit cannot be taken advantage of in collateral proceedings: *Cooman v. Board of Education of Rochester*, 37 Hun, 96.

ORDER TO APPEAR. — Where the statute does not require a copy of the affidavit to be served with the order, it is better to recite briefly in the order the facts stated in the affidavit, although this has been held to be unnecessary: *People v. Oliver*, 66 Barb. 570; *contra: Day v. Brosnan*, 6 Abb. N. C. 312. If the order undertakes to recite the facts conferring jurisdiction, it must recite them correctly, or else it will be dismissed if the objection be seasonably taken: *Riddle and Bullard on Supplementary Proceedings*, 3d ed., 99; *Hatch v. Weyburn*, 8 How. Pr. 163; *Hulsaver v. Wiles*, 11 Id. 446. The order should command the defendant to appear before the judge or referee, and name the time and place when and where he is bound to appear. If it fails to state the time or place, or is made returnable on Sunday, it is void, and may be disregarded: *Freeman on Executions*, sec. 401; *Riddle and Bullard on Supplementary Proceedings*, 100; *Kelty v. Daly*, 31 How. Pr. 95; *Arctic Ins. Co. v. Hicks*, 7 Abb. Pr. 204; *Gould v. Spencer*, 5 Paige, 541. Under the New York code, the order must be made by the judge, and not by the court: *Douglass v. Mainzer*, 40 Hun, 75. In most of the states the debtor cannot be required to appear before any judge or court out of the county in which he resides, or has a place of business: *Herzenheim v. Hooker*, 1 Duer, 594; *Wilson v. Andrews*, 9 How. Pr. 39; *Freeman on Executions*, sec. 401. The order may also restrain the defendant from making any transfer of his property: *People v. Kingsland*, 3 Abb. App. 528; *Deposit Bank v. Wickham*, 44 How. Pr. 421.

SERVICE OF ORDER should be made upon the defendant personally by exhibiting the original, and delivering a copy thereof to him: *People v. Hurtbert*, 5 How. Pr. 446; *Billings v. Carver*, 54 Barb. 40. Service of the order not made until after the time specified for the appearance of the defendant is void: *Henderson v. Stone*, 40 How. Pr. 333; *Riddle and Bullard on Supplementary Proceedings*, 3d ed., 103. Where an order to appear before a referee was served on the defendant without the seal of the court having been affixed

to the clerk's certificate, this was held to be no ground for dismissing the proceeding. And it was held that, after the appearance and examination of the debtor, he could not object to the service on that ground: *Dilling v. Foster*, 21 S. C. 334.

APPEARANCE. — A debtor summoned to appear and answer concerning his property must wait a reasonable time, say one hour, if the judge or officer does not appear at the time mentioned in the order. He is not at liberty to go away at once: *Reynolds v. McElhone*, 20 How. Pr. 454. Where the debtor fails to appear, the judgment creditor may continue that proceeding, or he may institute a new one: *Schanck v. Conover*, 56 Id. 437. The proceedings do not abate by the failure of either or both of the parties to appear on the day to which they have been adjourned: *Underwood v. Sutcliffe*, 10 Hun, 453. But it seems that, unless adjournments are made by the judge or referee, the jurisdiction terminates, and the examination cannot be renewed at a future time: *Mason v. Lee*, 23 How. Pr. 466; *Ammidon v. Wolcott*, 15 Abb. Pr. 314; *Squire v. Young*, 1 Bosw. 690; *Hawes v. Barr*, 7 Robt. 453; *Carter v. Clarke*, 7 Id. 490.

EXAMINATION. — The judgment creditor may examine his debtor only, or he may examine witnesses without examining the debtor: *Graves v. Lake*, 12 How. Pr. 33. Witnesses may be compelled to appear by the service of a subpoena issued out of the court where the judgment was rendered, or by the service of an order made by the officer before whom the examination is had. If a witness appears for examination, he may be compelled to answer all proper questions propounded to him, whether he was regularly subpoenaed or not: *People v. Marston*, 18 Abb. Pr. 257; *Freeman on Executions*, sec. 404. The provisions of the code were intended to give to the creditor complete authority for a full and searching examination of the debtor for the purpose of ascertaining particularly the amount and condition, as well as of the disposition which the debtor has made, or has attempted to make, of his property: *Forbes v. Willard*, 37 How. Pr. 193; S. C., 54 Barb. 520; *Sandford v. Carr*, 2 Abb. Pr. 462. The provisions authorizing such examination were enacted to give a more full examination than could be obtained without them: *Keiley v. Dusenbury*, 2 Abb. N. C. 363; S. C., 52 How. Pr. 281. If it is claimed that a question cannot be answered by a witness without criminating himself, the judge has the right to determine whether or not his answer is likely to have that effect, and to compel him to answer if he believes that it cannot have such effect: *Forbes v. Willard*, 37 How. Pr. 193; S. C., 54 Barb. 520. The creditor may investigate any alleged transfer of the debtor's property, and may compel all the witnesses to the transaction to disclose all the facts within their knowledge going to show its real nature and purpose: *Clapp v. Lathrop*, 23 How. Pr. 423; *Sandford v. Carr*, 2 Abb. Pr. 462; *Williams v. Carroll*, 2 Hilt. 438. The order and scope of the examination of a judgment debtor are largely in the discretion of the judge or officer before whom it is conducted, and the appellate court will not interfere, unless it clearly appears that there has been an abuse of discretion in requiring the debtor to answer improper interrogatories: *Cleveland v. Burnham*, 60 Wis. 16; *Heilbronner v. Levy*, 64 Id. 676. The judgment creditor is not restricted, in a case where it appears that an assignment has been made by the debtor for the benefit of his creditors, to inquiries concerning property acquired since the assignment. And the fact that he may have to bring an action in another forum does not affect his right: *Schneider v. Altman*, 16 Abb. N. C. 312; *Seligman v. Wallach*, 16 Id. 317. It is no objection to proceeding in the examination of the judgment debtor that, after the return of the execution unsatisfied, another exe-

cution has been issued and levied on personal property, unless it is clear that such levy will be effectual to satisfy the judgment: *Sale v. Lawson*, 4 Sand. 718. Ill health, or extreme mental excitement, is a good ground for postponing the examination of the debtor: *Mason v. Lee*, 23 How. Pr. 466. The evidence should all be taken down in writing: *Coates v. Wilkes*, 92 N. C. 376.

SECOND EXAMINATION. — The judgment debtor ought not to be harassed by successive examinations, unless there is good cause shown therefor. Where he has been once fully examined and the proceeding is terminated, the matter is *res judicata*, and a new examination can only be had upon showing, by affidavit or otherwise, that, since the former examination, he has acquired property in respect to which the creditor has a right to examine him, or that some new facts have since come to the knowledge of the moving party, whose existence justify the granting of a new order: *Carter v. Clarke*, 7 Robt. 43; *Orr's Case*, 2 Abb. Pr. 457; *Jurgenson v. Hamilton*, 5 Abb. N. C. 149; *Irvine v. Chambers*, 40 N. Y. Super. Ct. 432; *Rallings v. Pitman*, 49 Id. 307; *Gaylord v. Jones*, 7 Hun, 480; *Canavan v. McAndrew*, 20 Id. 46; *Grocers' Bank v. Bayaud*, 21 Id. 203; *Clarke v. Londrigan*, 40 N. J. L. 310.

ORDER AFTER EXAMINATION. — If the examination of the judgment debtor discloses the fact that he has in his possession, or under his control, property subject to execution, he may be ordered to apply it to the satisfaction of the judgment: *Freeman on Executions*, sec. 406; *People v. King*, 9 How. Pr. 97. But such an order will not be made, unless it is clear that the defendant is in a position to obey it: *Sandford v. Mosher*, 13 Id. 137; *Hull v. McMahon*, 10 Abb. Pr. 103; *Peters v. Kerr*, 22 How. Pr. 3; *Joyce v. Holbrook*, 2 Hilt. 94; *Locke v. Mabbett*, 3 Abb. App. 68. In *Spang v. Robinson*, 24 W. Va. 327, it was held that, under the West Virginia code, a commissioner cannot compel a judgment debtor to execute an assignment of his chose in action to satisfy the creditor's judgment. But in *Collins v. Angell*, 72 Cal. 513, it was held that an order directing a judgment debtor to assign all his right, title, and interest in a United States patent could not be assailed on the ground that it did not appear that he had any property therein, when the evidence on that point was conflicting.

These proceedings are not well adapted to litigate conflicting claims to property, nor to determine disputed questions of fact. Where there are conflicting claims made in good faith, the court will seldom order a delivery of the property, but will appoint a receiver, and leave the parties to litigate their rights in another form of action: *Stewart v. Foster*, 1 Hilt. 505; *Alexander v. Richardson*, 7 Robt. 63; *Barnard v. Kobbe*, 3 Daly, 373; *People v. King*, 9 How. Pr. 97; *Gasper v. Bennett*, 12 Id. 301; *Corning v. Tooker*, 5 Id. 16; *Teller v. Randall*, 26 Id. 154; *Crouse v. Whipple*, 34 Id. 333; *Clapp v. Lathrop*, 23 Id. 423; *Goodyear v. Betts*, 7 Id. 187; *Rodman v. Henry*, 17 N. Y. 482; *West Side Bank v. Pugsley*, 47 Id. 368; *Locke v. Mabbett*, 3 Abb. App. 68; *Collon v. Bigelow*, 41 N. J. L. 266; *Coates v. Wilkes*, 92 N. C. 376; *Hagerman v. Tong Lee*, 12 Nev. 331.

WHERE DEBTOR HAS KNOWN PROPERTY WHICH HE UNJUSTLY REFUSES TO APPLY towards the satisfaction of a judgment against him, the judgment creditor is entitled to compel his appearance and examination. And if it appears that the defendant is about to abscond, an order may be made for his arrest. In this case the affidavit must state that the defendant has specific property which he unjustly refuses to apply to the satisfaction of the judgment: *Freeman on Executions*, sec. 406; *Dandistel v. Kronenberger*, 39 Ind. 405; *Mitchell v. Bray*, 106 Id. 265; *Smith v. Weeks*, 60 Wis. 94; *Spears v.*

Wardell, 1 N. Y. 151; *Driggs v. Smith*, 47 How. Pr. 215; *Riddle and Bullard on Supplementary Proceedings*, 3d ed., 111. It must also be shown that a proper demand has been made upon the debtor to thus apply his property by some one who had a right to make the demand: *Hall v. Kellogg*, 12 N. Y. 331; *Hutson v. Weld*, 38 Hun, 142.

PROCEEDING AGAINST THIRD PERSON. — Proceedings against a third person indebted to the judgment debtor are independent of those against the judgment debtor himself, and may be had without the latter, and without notice to him: *Hexter v. Clifford*, 5 Col. 168; *Gibson v. Haggerty*, 37 N. Y. 555; S. C., 97 Am. Dec. 752. An affidavit must be filed on behalf of the plaintiff in this proceeding: *Mason v. Weston*, 29 Ind. 561. An affidavit that the person whose examination is desired has property of the judgment debtor in his hands, or is indebted to him, as the deponent is advised and believes, is sufficient to confer jurisdiction upon the judge to grant the order: *Miller v. Adams*, 52 N. Y. 409. If the affidavit alleges that the person whose examination is sought has property of the judgment debtor, it need not state the value of such property: *Brett v. Browne*, 1 Abb. Pr., N. S., 155; *Miller v. Adams*, 52 N. Y. 409.

A non-resident of a state who comes into it, even for a temporary purpose, may be garnished there if he have property of the defendant, or owe him a debt: *King v. Holmes*, 27 N. H. 266; *Young v. Ross*, 31 Id. 201; *Eaton v. Badger*, 33 Id. 228. But in all other cases no one can be summoned as a garnishee, unless he resides within the jurisdiction of the court which summons him: *Green v. Farmers' & C. Bank*, 25 Conn. 452; *Jones v. Winchester*, 6 N. H. 497; *Tingley v. Bateman*, 10 Mass. 343; *Hart v. Anthony*, 15 Pick. 445; *Nye v. Liscombe*, 21 Id. 263; *Lovejoy v. Albee*, 33 Me. 414; S. C., 54 Am. Dec. 630; *Columbus v. Eaton*, 35 Id. 391; *Baxter v. Vincent*, 6 Vt. 614; *Bates v. New Orleans etc. R. R. Co.*, 4 Abb. Pr. 72; *Willett v. Equitable Ins. Co.*, 10 Id. 193; *Sawyer v. Thompson*, 24 N. H. 510; *Miller v. Hooe*, 2 Cranch C. C. 622.

A New York court cannot compel a debtor to go out of the state and bring to it property which he owns in another state: *Buchanan v. Hunt*, 98 N. Y. 560, reversing 33 Hun, 329. But service of an order for a discovery may be made beyond the jurisdiction of the state: *Seyfert v. Edison*, 47 N. J. L. 428. A New York court will not order a receiver appointed by a court in New Jersey to pay over money in his hands belonging to the judgment debtor: *Smith v. McNamara*, 15 Hun, 447. A non-resident of New York, who has no place of business there, can only be examined in the county in which the judgment roll was filed: *Amoay v. David*, 9 Id. 296. Where a third person is to be made liable for property of the judgment debtor alleged to be in his hands, it is indispensable that the party so sought to be charged should be summoned and examined, before any order can be made for the surrender of such property: *Hathaway v. Brady*, 26 Cal. 581; *Cockfield v. Tourres*, 24 La. Ann. 168; *Jefferies v. Harvie*, 38 Miss. 97; *Roy v. Heard*, 38 Id. 544; *Michell v. Greenwald*, 43 Id. 167; *Moore v. Coates*, 43 Id. 225; *King v. Tuska*, 1 Duer, 635. Corporations are not, in New York, liable to proceedings supplemental to execution: *Hinds v. Canandaigua etc. R. R. Co.*, 10 How. Pr. 487; *Hammond v. Hudson R. I. etc. Co.*, 11 Id. 29; *Sherwood v. Buffalo etc. R. R. Co.*, 12 Id. 136; *Riddle and Bullard on Supplementary Proceedings*, 3d ed., 42. But in most of the states corporations may be summoned and charged the same as natural persons: *Freeman on Executions*, sec. 410; *Knox v. Protection Ins. Co.*, 9 Conn. 430; S. C., 25 Am. Dec. 33; *Tompkins v. Floyd Co. A. & M. Ass'n*, 19 Ind. 197; *Toledo etc. R'y Co. v. Howes*, 68 Id. 458; *Taylor v. Burlington etc. R. R. Co.*, 5 Iowa, 114; *Wales v. Muscatine*, 4 Id. 302; *Burton*

v. *District Township*, 11 Id. 166; *Boyd v. Chesapeake etc. Co.*, 17 Md. 196; S. C., 79 Am. Dec. 646; *St. Louis P. I. Co. v. Cohen*, 9 Mo. 416; *Baltimore & O. R. R. Co. v. Gallahue*, 12 Gratt. 655; S. C., 65 Am. Dec. 254; *Hughes v. Oregonian Ry Co.*, 11 Or. 158; *Knight v. Nash*, 22 Minn. 452; *La Fountain v. Southern Underwriters*, 79 N. C. 514.

Some cases hold that a foreign corporation can in no case be held as garnishees: *Danforth v. Penny*, 3 Met. 564; *Gold v. Housatonic R. R. Co.*, 1 Gray, 424; *Bradford v. Mills*, 5 R. I. 393; *Smith v. Boston etc. R. R. Co.*, 33 N. H. 337; *Freeman on Executions*, sec. 410. But it is generally held that where foreign corporations carry on business in a state, and have agents therein, they may be garnished: *Selma etc. R. R. Co. v. Tyson*, 48 Ga. 352; *McAlister v. Pennsylvania Ins. Co.*, 28 Mo. 214; *Jones v. New York & E. R. R. Co.*, 1 Grant Cas. 457; *Fithian v. New York & E. R. R. Co.*, 31 Pa. St. 114; *Brauser v. New England F. I. Co.*, 21 Wis. 506; *Freeman on Executions*, sec. 410. And a corporation existing in two states is regarded as a resident of both: *Baltimore & O. R. R. Co. v. Gallahue*, 12 Gratt. 655; S. C., 65 Am. Dec. 254; *Smith v. Boston etc. R. R. Co.*, 33 N. H. 337; *Freeman on Executions*, sec. 410.

The service of a garnishment, or of a notice to appear in supplemental proceedings, fixes the liability of the garnishee or person notified from the time of such service. And some cases hold that a lien is created by the service of the notice to appear: *Lynch v. Johnson*, 48 N. Y. 27; *Warfield v. Campbell*, 38 Ala. 527; S. C., 82 Am. Dec. 724; *Kellogg v. Collier*, 47 Wis. 649; *Union Bank v. Union Bank*, 6 Ohio St. 254; *Butler v. Jeffray*, 12 Ind. 504; *Graydon v. Barlow*, 15 Id. 197; *Wilder v. Weatherhead*, 32 Vt. 765; *State v. Linaweaver*, 3 Head, 51; *Billings v. Stewart*, 4 Dem. 265; *Deposit Bank v. Wickham*, 44 How. Pr. 421.

PROPERTY SUBJECT TO GARNISHMENT. — Property pledged, and on which the party has a lien, is not subject to attachment: *Piquet v. Swan*, 4 Mas. 443. Articles exempt from execution cannot be taken: *Staniels v. Raymond*, 4 Cush. 314. In Alabama, garnishment only lies to subject those demands for which the judgment debtor could maintain debt or *indebitatus assumpsit*: *Lundie v. Bradford*, 26 Ala. 512; *Cook v. Walthall*, 20 Id. 334. Wages of overseers, clerks, or other persons paid by the week or month, cannot be garnished in proceedings supplemental to execution: *Caraker v. Mathews*, 25 Ga. 571; *Butler v. Clark*, 46 Id. 466; *Claghorn v. Saussy*, 51 Id. 516. Salaries of officers of the state or of municipal corporations cannot be reached: *Wallace v. Lawyer*, 54 Ind. 501; S. C., 23 Am. Rep. 661; *Swepton v. Turner*, 76 N. C. 115; *Roeller v. Ames*, 33 Minn. 132. The equitable interest of a partnership, under a contract to convey land to the firm, cannot be reached for partnership creditors: *McCuskill v. Lancashire*, 83 N. C. 393. The chose in action of the judgment debtor can only be reached in Indiana by proceedings supplemental to execution: *Keightley v. Walls*, 27 Ind. 384; *Fowler v. Griffin*, 83 Id. 297. The interest of a judgment debtor in real estate in his possession, under a contract of purchase, may be applied in satisfaction of the judgment: *Figg v. Snook*, 9 Id. 202. Property on which there is a lien cannot be taken without discharging the lien: *Nathan v. Giles*, 5 Taunt. 558; *Smith v. Clarke*, 9 Iowa, 241; *Kirkman v. Hamilton*, 9 Mart. 297. Property over which the debtor has lost his control cannot be taken: *Oliver v. Lake*, 3 La. Ann. 78; *Burnside v. McKinley*, 12 Id. 505; *Armor v. Cockburn*, 4 Mart. N. S., 667. In California, a judgment in favor of the judgment debtor may be reached and applied: *Adams v. Hackett*, 7 Cal. 187.

Only demands existing at the time of the service of notice are held: *Norris*

v. Burgoyne, 4 Cal. 409; *Bean v. Mississippi Union Bank*, 5 Rob. (La.) 333; *Board of Education v. Scoville*, 13 Kan. 17; *Tyler v. Winslow*, 46 Me. 348; *Allen v. Hall*, 5 Met. 263; *Brackett v. Blake*, 7 Id. 335; *Osborne v. Jordan*, 3 Gray, 277; *Hadley v. Peabody*, 13 Id. 200; *Nash v. Gale*, 2 Minn. 310; *Davenport v. Swan*, 9 Humph. 186; *Haffey v. Miller*, 6 Gratt. 454; *Wood v. Wall*, 24 Wis. 647; *Sands v. Roberts*, 8 Abb. Pr. 343; *Gerregani v. Wheelerright*, 3 Abb. Pr., N. S., 264; *Caton v. Southwell*, 13 Barb. 335.

ANSWER OF GARNISHEE. — Some authorities hold that the answer of the garnishee must be accepted as true: *Lamb v. Franklin M. Co.*, 18 Me. 187; *Whitman v. Hunt*, 4 Mass. 272; *Barker v. Tabor*, 4 Id. 81; *Kelly v. Bowman*, 12 Pick. 383; *Hawes v. Langton*, 8 Id. 67; *Newell v. Blair*, 7 Mich. 103; *Thomas v. Sprague*, 12 Id. 120; *Moore v. Green*, 4 Humph. 299; *Brown v. Slate*, 7 Id. 112; *Childress v. Dickens*, 8 Yerg. 113; *Conner v. Allen*, 3 Head, 418. The more generally accepted doctrine, however, is, that the answer is only to be taken as *prima facie* true, and that it may be controverted and disproved: *Mason v. McCampbell*, 2 Ark. 506; *Britt v. Bradshaw*, 18 Id. 530; *People v. Johnson*, 15 Ill. 342; *Rankin v. Simonds*, 27 Id. 352; *Wilhelmi v. Haffner*, 52 Id. 222; *Truitt v. Griffin*, 61 Id. 26; *Toledo etc. R'y Co. v. Howe*, 68 Ind. 458; *Bipus v. Deer*, 106 Id. 135; *Coleman v. Fennimore*, 16 La. Ann. 253; *Barnes v. Wayland*, 14 Id. 791; *Thomas v. Sturgis*, 32 Miss. 261; *Williams v. Jones*, 42 Id. 270; *Davis v. Knapp*, 8 Mo. 657; *Holton v. S. P. R. R. Co.*, 50 Id. 151; *Hess v. Shorb*, 7 Pa. St. 231; *Ellison v. Tuttle*, 26 Tex. 283; *Beck v. Cole*, 16 Wis. 95.

SUSPENSION OF INTEREST. — Where money is garnished under an attachment, the garnishee, if free from fault, will not be charged with interest on the credit or money which is attached in his hands: *Freeman on Executions*, sec. 413; *Georgia Ins. Co. v. Oliver*, 1 Ga. 38; *Moore v. Lowery*, 25 Iowa, 336; S. C., 95 Am. Dec. 790; *Stevens v. Gwathmey*, 9 Mo. 628; *Swamecot M. Co. v. Partridge*, 25 N. H. 369; *Blair v. Porter*, 13 N. J. Eq. 267; *Iroquois v. Pittsburgh etc. R. R. Co.*, 43 Pa. St. 488; *Fitzgerald v. Caldwell*, 2 Dall. 215; *Willing v. Consequa*, Pet. C. C. 301.

DEFENSES AVAILABLE TO GARNISHEE. — It is well settled that a garnishee cannot object to mere errors in the proceedings antecedent to the judgment. These errors can be availed of by the defendant only: *Freeman on Executions*, sec. 416; *Gunn v. Howell*, 35 Ala. 144; S. C., 62 Am. Dec. 785; *Hollingsworth v. Hammond*, 30 Id. 668; *Coit v. Haven*, 30 Conn. 190; S. C., 69 Am. Dec. 244; *Matheny v. Galloway*, 12 Smedes & M. 475; *St. Louis P. I. Co. v. Cohen*, 9 Mo. 421; *Lederer v. Ehrenfeld*, 49 How. Pr. 403; *People v. Oliver*, 66 Barb. 570; *Foster v. Jones*, 1 McCord, 116; *Camberford v. Hall*, 3 Id. 345; *Douglas v. Brown*, 37 Tex. 528. But if the judgment be void, the garnishee will not be protected by any payment he make under it. He is therefore bound to avail himself of that defect in order to protect himself, whether the defendant objects or not: *Pierce v. Carlton*, 12 Ill. 358; S. C., 54 Am. Dec. 406; *Berry v. Anderson*, 2 How. (Miss.) 649; *Ford v. Hurd*, 4 Smedes & M. 683.

As a general rule, any defense which the garnishee could set up against the judgment debtor he may set up in resisting the claim of the attaching creditor: *Firebaugh v. Stone*, 36 Mo. 111; *Myers v. Baltzell*, 37 Pa. St. 491; *Hazen v. Emerson*, 9 Pick. 144; *Benton v. Lindell*, 10 Mo. 557; *Hinkle v. Curran*, 2 Humph. 137; *Smyth v. Ripley*, 33 Conn. 306; *Spring v. Ayer*, 23 Vt. 516; *Gleason v. Gage*, 2 Allen, 410; *Howard v. Crawford*, 21 Tex. 399. The garnishee may set up in defense that the property is exempt from execution, although the judgment debtor makes no such claim. And it is safest for him

to set up such defense, if he can, in order to save himself from future liability. *Freeman on Executions*, sec. 416; *Caraker v. Mathews*, 25 Ga. 571; *Lock v. Johnson*, 36 Me. 464; *Wallace v. Lawyer*, 54 Ind. 501; S. O., 23 Am. Rep. 661; *Davenport v. Swan*, 9 Humph. 186; *Clark v. Averill*, 31 Vt. 512; *Winterfeld v. Milwaukee etc. R'y Co.*, 29 Wis. 589.

SET-OFF. — It is a general rule that the garnishee may offset against the claim of the judgment creditor whatever demand he might be able to set off against the judgment debtor's claim against him in any of the modes allowed, either by the statute or the common law. And, on the other hand, the garnishee cannot offset any claim in these proceedings which he could not avail himself of in a suit brought against him by his immediate creditor: *Thomas v. Hopper*, 5 Ala. 442; *Loflin v. Shackelford*, 17 Id. 455; *Self v. Kirkland*, 24 Id. 275; *Powell v. Sammons*, 31 Id. 552; *Price v. Masterson*, 35 Id. 483; *Gray v. Badgett*, 5 Ark. 16; *Field v. Watkins*, 5 Id. 672; *Watkins v. Field*, 6 Id. 391; *Edwards v. Delaplaine*, 2 Harr. (Del.) 322; *Dyer v. McHenry*, 13 Iowa, 527; *Blanchard v. Cole*, 8 La. 160; *Ingalls v. Dennett*, 6 Me. 79; *Boston T. & S. F. Co. v. Mortimer*, 7 Pick. 166; *Smith v. Stearns*, 19 Id. 20; *Allen v. Hall*, 5 Met. 263; *Boardman v. Cushing*, 12 N. H. 105; *Sampson v. Hyde*, 16 Id. 492; *Swanescot M. Co. v. Partridge*, 25 Id. 369; *Boston etc. R. R. v. Oliver*, 32 Id. 172; *Brown v. Warren*, 43 Id. 430; *Pennell v. Grubb*, 13 Pa. St. 552; *Strong v. Bass*, 35 Id. 333; *Norcross v. Benton*, 38 Id. 217; *Yongue v. Linton*, 6 Rich. 275; *Martin v. Solomons*, 10 Id. 533; *Farmers' Bank of Virginia v. Gettinger*, 4 W. Va. 305; *Seamon v. Bank of Berkeley*, 4 Id. 339; *Taylor v. Gardner*, 2 Wash. C. C. 488; *Picquet v. Swan*, 4 Mas. 443; *Randolph v. Randolph*, 34 Tex. 181; *Wells v. Mace*, 17 Vt. 503; *Strong v. Mitchell*, 19 Id. 644.

RECEIVER. — Statutes providing for proceedings supplemental to executions generally authorize the judge or court before whom the proceedings are instituted to appoint a receiver: *Freeman on Executions*, sec. 419; *Riddle and Bullard on Supplemental Proceedings*, 3d ed., 344; *Ball v. Goodenough*, 37 How. Pr. 479; *Dickinson v. Onderdonk*, 18 Hun, 479.

In Minnesota, the appointment of a receiver rests in the discretion of the court: *Flint v. Webb*, 25 Minn. 263. The same person is required to act as receiver in all proceedings against the judgment debtor. But in a proceeding in the federal courts, the court is not bound to appoint the same receiver that was previously appointed in a similar prior proceeding in the state court: *Young v. Aronson*, 27 Fed. Rep. 241. In that case it was said to be better to appoint a separate receiver, to avoid confusion and conflict. Where the examination discloses sufficient property in the debtor's hands subject to levy and sale to satisfy the judgment, a receiver may be appointed: *Dilling v. Foster*, 21 S. C. 334. But it is no objection to the appointment of a receiver that the examination has not disclosed any property of the debtor subject to execution: *Colton v. Bigelow*, 41 N. J. L. 266; *Seyfert v. Edison*, 47 Id. 428; *Myer's Case*, 2 Abb. Pr. 476; *Bloodgood v. Clark*, 4 Paige, 574; *Bailey v. Lane*, 15 Abb. Pr. 373, note. In Wisconsin, if a proceeding is commenced before a county judge or a court commissioner, the latter has power, in a proper case, to appoint a receiver, and the circuit court in which the judgment was rendered cannot transfer the proceeding pending before such commissioner to that court, and proceed to appoint a receiver: *Clark v. Bergenthal*, 62 Wis. 103. The judge may, at any time pending the proceeding before him, appoint a receiver, and he does not lose jurisdiction by appointing him before he concludes the examination: *People v. Mead*, 29 How. Pr. 360. In New York, it seems that a receiver must be appointed to bring suit against one who refuses to comply with an order directing him to pay to the judgment

creditor a debt due from him to the judgment debtor, and that the creditor cannot himself maintain such action: *Patten v. Connah*, 13 Abb. Pr. 418. But the California code provides that, where a party denies the debt or claims an interest in the property adverse to the judgment debtor, the court or judge may by an order authorize the judgment creditor to institute an action for the recovery of such interest or debt: Cal. Code Civ. Proc., sec. 720.

The validity of the appointment of a receiver cannot be tested collaterally. The judgment debtor alone can avail himself of any irregularity in such appointment: *Tyler v. Willis*, 33 Barb. 327; *Underwood v. Sutcliffe*, 10 Hun, 453; *Peters v. Carr*, 2 Dem. 22.

The general principles of law applicable to receivers generally apply to receivers appointed in supplementary proceedings: *Coates v. Wilkes*, 92 N. C. 376. For a discussion of these principles, see note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 482 et seq.

In New York it seems that a receiver cannot be appointed without giving notice to the judgment debtor of the application, unless where, after due diligence, he cannot be found within the state: *Kemp v. Harding*, 4 How. Pr. 178; *Andrews v. Glensville Woolen Co.*, 11 Abb. Pr., N. S., 78; *Strong v. Epstein*, 14 Abb. N. C. 322; *Morgan v. Kohnstamm*, 60 How. Pr. 161; *Ashley v. Turner*, 22 Hun, 226. Nor has the court power, without notice to the judgment debtor, to make an order directing a receiver to apply any portion of the funds coming to his hands in payment of judgments other than that under which he was appointed, or those to which his receivership has been extended: *Goddard v. Stiles*, 90 N. Y. 199. In New Jersey, however, where an order for the examination of a judgment debtor has been duly served, and he fails to appear, the court may examine other witnesses, and an order appointing a receiver may be thereupon made: *Colton v. Bigelow*, 41 N. J. L. 266. And in *Dilling v. Foster*, 21 S. C. 334, it was held that on the hearing of the referee's report, the judge may appoint a receiver without specific notice having been given that such appointment would then be applied for.

TITLE OF RECEIVER.—When a receiver is appointed in supplemental proceedings, he becomes the legal assignee of the judgment debtor, and the title to all personal property that can be forced to contribute to the payment of the debts of the judgment debtor vests in him, without any formal assignment: *Matter of Wilds*, 6 Abb. N. C. 307; *Wing v. Disse*, 15 Hun, 190; *Swartout v. Schwerter*, 5 Redf. 497; *Wilson v. Allen*, 6 Barb. 542; *Porter v. Williams*, 9 N. Y. 142; *Harrison v. Maxwell*, 44 N. J. L. 316; *Turner v. Holden*, 94 N. C. 70. The title to the real estate vests in him, in New York, upon his filing in the office of the clerk of the county in which the debtor resides, and in the office of the county in which the property is situated, the order appointing him: *Wright v. Nostrand*, 47 N. Y. Super. Ct. 441; *Manning v. Evans*, 19 Hun, 500. The receiver by his appointment becomes vested with such property only as the judgment debtor had at the commencement of the proceedings: *Dubois v. Cassidy*, 75 N. Y. 298; *Campbell v. Genet*, 2 Hilt. 290. If a judgment debtor dies before the order appointing the receiver is filed, the property of the debtor does not vest in the receiver, nor has the judgment creditor any lien on it as against the administrator: *Rankin v. Minor*, 72 N. C. 424.

DUTIES OF RECEIVER appointed in proceedings supplementary to execution are, to appropriate the property of the judgment debtor to the satisfaction of the judgment under which he is appointed, and any other to which his receivership may be duly extended, and to restore the surplus,

if any, to the judgment debtor: *Goddard v. Stiles*, 90 N. Y. 199; *Porter v. Williams*, 9 Id. 142.

POWERS OF RECEIVER. — The receiver so appointed has power to sue for and recover the property of the judgment debtor, so far as may be necessary for the attainment of the purposes of his appointment: *Bostwick v. Menck*, 40 N. Y. 383; *Kennedy v. Thorpe*, 3 Abb. Pr., N. S., 131; *Hamlin v. Wright*, 23 Wis. 491; *Fields v. Sands*, 8 Bosw. 685. He may employ on his behalf the attorney of the party for whose benefit the proceedings are instituted: *Baker v. Van Epps*, 60 How. Pr. 79, overruling *Branch v. Branch*, 49 Id. 196, and *Cumming v. Edgerton*, 9 Bosw. 685.

PUNISHMENT FOR CONTEMPT. — After the judge or court has acquired jurisdiction by the service of an order to appear in the proceeding, disobedience of any order duly made may be punished as a contempt, and imprisonment imposed until the order is complied with: *Brush v. Lee*, 1 Abb. App. 238; *People v. Kingsland*, 3 Id. 526; *Ex parte Kellogg*, 64 Cal. 343; *Ex parte Latimer*, 47 Id. 131; *Ex parte McDonald*, 17 Pac. Rep. 234 (Sup. Ct. Cal., Mar. 1888); *Kearney's Case*, 13 Abb. Pr. 459; *In re Pester*, 2 Code Rep. 98; *Freeman on Executions*, sec. 421; *Earl v. Stokes*, 5 S. C. 336; *Tremaine v. Richardson*, 68 N. Y. 619, citing the principal case. In Wisconsin it is held that the statute authorizing the punishment of a party as for a contempt for disobeying an order made in the course of proceedings supplemental to execution should be strictly construed: *Smith v. Weeks*, 60 Wis. 94. In Missouri, the referee appointed to conduct the examination of the judgment debtor has authority to commit him for contempt, where he refuses to answer proper questions: *State v. Barclay*, 86 Mo. 55. To authorize the court to punish a party for contempt in refusing to pay over money or to deliver up property in pursuance of its order, it must appear that the specific property or sum of money was, at the time of the service of the order for his examination, in his possession or under his control: *Tinker v. Crooks*, 22 Hun, 579.

A judgment debtor who disposes of his property after he has been enjoined from doing so, or who does any other act for the purpose of defeating the purpose of the proceedings against him, may be punished as for contempt: *Ex parte Kellogg*, 64 Cal. 343; *People v. Kingsland*, 3 Abb. App. 526. A witness who refuses to answer proper questions may be punished for contempt: *Clapp v. Lathrop*, 23 How. Pr. 423; *People v. Marston*, 18 Abb. Pr. 257. A judgment debtor who refuses to apply property to the satisfaction of the judgment, when so ordered by the court, may be punished for contempt, although he has denied under oath that he has any such property: *In re Pester*, 2 Code Rep. 98. A fine may be imposed upon the judgment debtor found guilty of contempt, although the court does not adjudge that the misconduct of the debtor has produced actual loss or injury to the creditor, or that it was calculated to defeat, or actually did defeat, impair, or impede his rights or remedies. But when such an adjudication is not made, the fine should be limited to the costs and expenses: *People v. Oliver*, 66 Barb. 570. An order for the surrender of a sum of money ascertained to be in defendant's hands, and for his imprisonment in case of refusal, is not a "punishment without trial by jury," nor "imprisonment for debt," within the meaning of the constitution: *Kennesaw Mills Co. v. Walker*, 19 S. C. 104. The power given by the West Virginia statute to the commissioner to attach a defendant who refuses to answer the interrogatories propounded to him is not unconstitutional: *Lewis v. Roeler*, 19 W. Va. 61. Proceedings supplemental to execution are in their nature equitable, and the defendant therein has no constitutional right to a trial by jury: *Murne v. Schwabacher*, 2 West Coast Rep. 799. A third per-

son, ordered to deliver up a bond, alleged to belong to the judgment debtor, to the receiver, who hands it instead to an attorney for collection, is *prima facie* guilty of contempt. But if he shows that he did not intend any contempt, he should be discharged on payment of costs: *Bond v. Bond*, 69 N. C. 97.

The exercise of the power to punish for contempt rests in the discretion of the court or judge, and an order of a judge refusing to punish a party for disobedience is not appealable: *Freeman on Executions*, sec. 421; *Joyce v. Holbrook*, 7 Abb. Pr. 338.

WITNESSES. — Witnesses may be produced and examined by either party, as in other civil actions: *Riddle and Bullard on Supplementary Proceedings*, 3d ed., 151. They are entitled to witness fees: *Davis v. Turner*, 4 How. Pr. 190. They may be punished for refusal to answer: *Page v. Randall*, 6 Cal. 32. In New York a witness in these proceedings may be compelled to appear in a county other than that of his residence: *Foster v. Wilkinson*, 37 Hun, 242. The judgment creditor, by examining the judgment debtor, does not thereby make him his witness. But he may cross-examine and contradict him: *Coates v. Wilkes*, 92 N. C. 376. The wife of the judgment debtor may be examined as a witness: *Riddle and Bullard on Supplementary Proceedings*, 3d ed., 154; *Lockwood v. Worstell*, 15 Abb. Pr. 430, note; *Claremont Bank v. Clark*, 46 N. H. 134. And she may be compelled to disclose whether she has in her possession property belonging to the husband: *Petition of O'Brien*, 24 Wis. 547.

THE PRINCIPAL CASE IS QUOTED in *Keiley v. Dusenburg*, 2 Abb. N. C. 363, S. C., 52 How. Pr. 290, to the effect that section 292 of the New York code was undoubtedly made to give a more full examination than could be obtained without it; it is cited in *Champlin v. Stoddart*, 17 Week. Dig. 77, to the point that the pursuing creditor, in proceedings supplementary to execution, has the right to make a searching inquiry, and where the witness is a party to the transfer of the debtor's property, he should not be given any privileges outside the strict rules of examination; in *Seligman v. Wallack*, 16 Abb. N. C. 318, S. C., 67 How. Pr. 515, 6 Civ. Proc. Rep. 233, to the point that the mere fact of the debtor's having made a general assignment of his property stops all further inquiry on the part of the creditor in proceedings supplementary to execution, seems to be untenable and inconsistent with their manifest purpose; in *Mechanics' etc. Bank v. Healy*, 14 Week. Dig. 120, to the point that a judgment creditor may show, if he is able to do so, in such proceedings, that the purchase by a witness from the judgment debtor was not made in good faith, and for that reason was invalid as against the creditor; in *Schneider v. Altman*, 16 Abb. N. C. 315, S. C., 2 How. Pr., N. S., 450, 8 Civ. Proc. 248, as presenting fully the question that property fraudulently conveyed to a general assignee is subject to the claims and demands of creditors in any form or method of proceeding which they may institute to reach it; in *Tremain v. Richardson*, 68 N. Y. 619, as showing that the supreme court of New York can punish, as for contempt, for the disobedience of an order made by a county judge, in proceedings supplementary to execution upon a supreme court judgment; and in *Robert v. Morgan*, 4 Dem. 151, as to the obligation of a trustee to answer certain questions concerning an investment, when the propriety thereof has been put in issue by objections to his account.

judgment in favor of the defendants was based, first, upon the idea that, by the exercise of proper diligence, the plaintiffs might have learned that the defendants' executions had expired, and thus have avoided the error; and second, that, by the discharge of their judgments, the defendants had lost their lien upon the real estate of their judgment debtor, and if compelled to refund, would in fact lose their debt. I will consider each of these positions.

As to the first proposition,—that the plaintiff had the means of learning the true state of the case: It cannot be denied that either party might have made inquiry, and would probably have learned the actual facts. There is no reason to suppose that the sheriff would have refused an explanation of the order and lien of the executions in his hands, if he had been called upon for that purpose. This course, however, was open to either party, and there is no more negligence in failing to obtain the knowledge by one party than the other. The defendants were equally bound with the plaintiffs to possess the knowledge, and if the want of it is a ground of complaint, are equally censurable with the plaintiffs for not possessing it. In *Canal Bank v. Bank of Albany*, 1 Hill, 290, the court say: "The conduct of both parties was *bona fide*, and the negligence, or rather misfortune, of both the same. It was the duty, or more properly a measure of prudence, in each to have inquired into the forgery, which both omitted. But this raises no preference at law or equity in favor of the defendants, but against them. They have obtained the plaintiffs' money without consideration, not as a gift, but under a mistake. For the very reason that the parties are equally innocent, the plaintiffs have the right to recover." The same rule is laid down in *Bank of Commerce v. Union Bank*, *supra*.

Care and diligence are not controlling elements in the case. It is a question of fact merely. The inquiry is, Are the parties mutually in error? And did they act upon such mutual mistake?—not whether they ought so to have acted. If, in consequence of such mutual mistake, one party has received the property of the other, he must refund, and this without reference to vigilance or negligence. On a sale and purchase of real estate, the rule and the principle are different. It is a case of a bargain in which the law requires the exercise of care and attention. A party cannot then allege himself to be ignorant of a fact of which he was put upon the inquiry, and of which he could have obtained a knowledge by reasonable dili-

gence. In cases of bargains and sales, the rule is applicable, *Vigilantibus non dormientibus leges subveniunt*. Such was the case cited of *Taylor v. Fleet*, 4 Barb. 95, and of which there are many instances in the books. But where there is no matter of contract, no bargain or sale, there is no call for the exercise of astuteness. The case then becomes one of fact. Was there or not an error between the parties? And the determination of that fact controls the result.

Where this expression of the want of care and attention is used in reference to cases of simple mistakes of fact, by which one has thus received the money of another, and that it is thus used in many cases cannot be denied, the expressions have not been duly considered. In support of this view, I refer to *Townsend v. Crowdy*, 8 Com. B., N. S., 476, 492. A had agreed with B to purchase his share of a partnership business, for a given sum, subject to diminution, if a moiety of the profits for three years should be less than a certain amount. Having made a partial investigation of the accounts, and believing that the profits had reached the amount named, A paid the sum in full. Six months afterwards, a more accurate estimate having been made, it was discovered that the profits were considerably less than the estimated amount. Held, that the payment having been made under a mistake of fact, A was entitled to recover back from B the sum paid in excess. In ordering judgment upon the case stated, Erle, C. J., said: "I am of the opinion that our judgment in this case should be for the plaintiff. . . . It seems, from a long series of cases, from *Kelly v. Solari*, 9 Mees. & W. 54, down to *Dails v. Lloyd*, 12 Q. B. 531, 64 Eng. Com. L., that where a party pays money under a mistake of fact, he is entitled to recover it back, although he may, at the time of the payment, have had means of knowledge, of which he has neglected to avail himself." Williams, J., said: "I am entirely of the same opinion. . . . Since the case of *Kelly v. Solari*, it has been established that it is not enough that the party had the means of learning the truth, if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry." Willes, J., concurred. Byles, J., said: "I am of the same opinion. . . . All the three courts have held that the right to recover back money so paid is not fettered by the condition suggested, that there shall not only be absence of knowledge, but also absence of the means of knowledge, of the facts."

In *Kelly v. Solari*, above referred to, the plaintiff represented a life assurance company, and brought the action to recover from Madame Solari the sum paid to her on a life policy of one thousand pounds in favor of her deceased husband. The deceased having neglected to pay his quarterly premium in September, the directors of the company, in November following, wrote upon the policy the word "lapsed." M. Solari died in October, and in the February following the defendant proved her husband's will, demanded the payment of the policy, and received the amount, less a sum deducted for payment before maturity. The directors testified that at the time of making the payment, they had forgotten that the policy had been lapsed. At the trial, the lord chief baron expressed his opinion that if the directors had had knowledge, or the means of knowledge, of the policy having lapsed, the plaintiff could not recover, and that their afterwards forgetting it would make no difference. He directed a nonsuit, reserving leave to the plaintiff to move for a verdict for the amount claimed. On such motion being made, Lord Abinger, C. B., said: "I think the plaintiff ought to have had the opportunity of taking the opinion of the jury whether in reality the directors had knowledge of the facts, and therefore that there should be a new trial, and not a verdict for the plaintiff; although I am now prepared to say that I laid down the rule too broadly at the trial as to the effect of their having had means of knowledge." Parke, B., concurred, saying, among other things: "The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the *dictum* of Mr. Justice Bayley, in *Milner v. Duncan*, 6 Barn. & C. 671; and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to claim it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact."

The case of *Dails v. Lloyd*, referred to in the above opinion, is reported also in 12 Ad. & E., N. S., 531, 64 Eng. Com. L.

These cases show that the question of care and diligence does not arise in an action like the present.

The next proposition of the respondents is, that by the discharge of their judgments, they have lost their lien upon the real estate of their judgment debtors, and if compelled to refund would lose their debt. To state it in another form, they insist that the claim against them cannot be maintained, unless they can be restored to their original position, and secured from the intervention of other liens and purchases. This they say cannot now be done, citing *Crozier v. Acker*, 7 Paige, 137. That was the case of a mistake of law. The chancellor says: "If this court can relieve against a mistake in law in any case, where the defendant has been guilty of no fraud, which is very doubtful, it must be in a case in which the defendant has lost nothing by the mistake, and where the parties can be restored to the same situation in which they were at the time the mistake happened."

The application of this principle to the present case would substantially destroy the rule that money paid in mistake of facts can be recovered by the payor from the receiver. If the facts could be so arranged that there would be no loss to either party, there would be nothing to contend about, and no such actions would be brought. It is only where the retention or restoration of the money involves a loss that the parties are anxious about it. It is an ordinary result of the transaction that the party receiving has incurred liabilities or paid money which he would not have done, except for the receipt of the money. I find no case, however, in which this has been held to relieve him from the performance of his duty. In the present case, the one party or the other, upon the facts found, will lose his debt. By canceling their judgment, the respondents will have lost an available security. By failing to receive the amounts due to them upon their subsisting executions, the appellants will have lost their debt. One party or the other being compelled to lose, the question is, Which shall it be? The answer given by the authorities is, that the party having the legal right must prevail. In the *Canal Bank v. Bank of Albany*, 1 Hill, 287, which was an action by one bank to recover from the other the amount of a draft paid to it upon a forged indorsement of the name of the payee, the plaintiff recovered as for money paid by mistake, and it was held no defense to show that the defendant had collected the money as the agent of another bank in the city of New York,

and had in good faith and without notice paid over the money to its principal. Here a loss was inevitable to the defendant or its principal, and it was impossible to restore them to the position of the holder of an unmatured and unprotected draft. They were held liable nevertheless.

In *Bank of Commerce v. Union Bank*, 3 N. Y. 230, the same principle is laid down, and in the same manner. The Union Bank had paid to its New Orleans correspondent the money received from the plaintiff.

In *Rheel v. Hicks*, 25 N. Y. 289, a complaint had been made against the plaintiff that he was the father of a bastard child of which one Louisa Hepe was pregnant, and upon the oath of the said Louisa. The plaintiff was arrested, and compromised the matter with the superintendent of the poor by paying him fifty dollars, in consideration of a full settlement and release for the child's support. It turned out that the complainant was not pregnant with a child by any one, and that she was not delivered of a child at all. The plaintiff brought his action against the defendant to recover back the money paid, and recovered. This court also held that the fact that he had paid over the money to the county did not alter the case, although it was his duty so to pay over all moneys received for the support of bastards.

Neither of the propositions on which the judgment of the supreme court is supposed to be based can be maintained. There is nothing to except this case from the general principles applicable to its class, and upon the facts found the judgment should have been for the plaintiff.

The supreme court could readily vacate the satisfaction of the judgments, and restore the defendants to their former position, so far as the judgment debtors are concerned. Should there have been *bona fide* purchases in the mean time, the case would be more complicated, and we are not called upon to say what would be the result. In any event, I think this consideration cannot prevent the plaintiffs from recovering the moneys justly due to them: *Adams v. Smith*, 5 Cow. 280; *Barker v. Bissinger*, 14 N. Y. 270.

The judgment should be reversed, and a new trial granted.

THE PRINCIPAL CASE again came before the court of appeals in *Kingston Bank v. Eltinge*, 66 N. Y. 625, the court finally holding that the plaintiff was not entitled to recover.

MONEY PAID UNDER MISTAKE OF FACT MAY BE RECOVERED BACK: *Appleton Bank v. McGilvray*, 64 Am. Dec. 92, and note; *Ellis v. Ohio L. Ins. &*

T. Co., 64 Id. 610, and note; *Logan v. Sumter*, 73 Id. 755. The principal case is cited to this effect in *White v. Continental National Bank*, 64 N. Y. 323; *Lawrence v. American National Bank*, 54 Id. 435; *Baker v. Clark*, 12 Abb. Pr., N. S., 111; *Bridges v. Supervisors of Sullivan Co.*, 27 Hun, 180; S. C., 14 Week. Dig. 508; *Evans v. Garlock*, 37 Hun, 590; S. C., 22 Week. Dig. 409; and it is cited in *Holt v. Ross*, 59 Barb. 556, as approving *Canal Bank v. Bank of Albany*, 1 Hill, 287, to the same point. Nor does it affect the right to recover that the mistake arose from the negligence of the party making the payment: *Appleton Bank v. McGilroy*, 64 Am. Dec. 92, and note; note to *Ellis v. Ohio L. Ins. & T. Co.*, 64 Id. 631. The principal case is an authority for this proposition in *Union National Bank v. Sixth National Bank*, 43 N. Y. 454; *Lawrence v. American National Bank*, 54 Id. 435; *Baker v. Clark*, 12 Abb. Pr., N. S., 115; *National L. Ins. Co. v. Jones*, 1 Thomp. & C. 470, 471; *National Bank of Commerce v. National Mechanics' Bank*, 3 Jones & S. 290; S. C., 46 How. Pr. 380; *Dietrich v. Mayor etc. of New York*, 5 Hun, 422. And it is equally unavailing to show that the defendant cannot be restored to his original position upon paying the money back: *Mayer v. Mayor etc. of New York*, 2 Id. 307; S. C., 4 Thomp. & C. 490, citing the principal case; but negligence in giving information of the mistake to the other party, with resulting loss of remedy over, is a defense: *United States v. National Park Bank*, 6 Fed. Rep. 854, referring to the principal case.

THE PRINCIPAL CASE IS ALSO CITED IN *Sahler v. Williams*, 17 Week. Dig. 81, to the point that an action for money had and received is an equitable action, and every equitable defense is available; it is referred to in *Schwinger v. Hickok*, 53 N. Y. 286, on the right of a purchaser, upon a sale under a void execution, to recover back the money paid; it is distinguished in *Benedict v. Jones*, 18 Hun, 528, as not in conflict with the principle that a judicial sale will not be set aside where the surprise or mistake complained of is owing to the neglect or inattention of the party injured, and is of a character which would have been avoided by the exercise of ordinary care; and is also distinguished in *Osby v. Conant*, 5 Lans. 312, where the defendant purchased from a third person, to whom the plaintiff had intrusted it, a county treasurer's certificate for a bounty bond, and obtained the bond from the county treasurer; it is cited in *Frank v. Lanier*, 91 N. Y. 116, S. C., 16 Week. Dig. 82, to the point that one who sells as genuine a forged note cannot avoid his liability to refund because of delay in detecting the forgery, or in giving notice of it; and is referred to in *Witbeck v. Van Rensselaer*, 64 N. Y. 31, on the point that after the return day of a *feri facias* the power of the sheriff to levy on personal property is gone, and the plaintiff is put to a new execution if he wishes to pursue the defendant's property.

TURNBULL v. BOWYER.

[40 NEW YORK, 456.]

ONE WHO WRITES HIS NAME ON BACK OF CHECK FOR PURPOSE OF DEPOSIT IN BANK, and then declines to take it, but allows the holder to receive it thus indorsed and to depart, is liable as indorser to any subsequent bona fide holder, for value.

INDORSER OF NEGOTIABLE PAPER WARRANTS GENUINENESS OF PRIOR SIGNATURES to every subsequent bona fide holder, for value; and if the signatures are forgeries, he is at once liable upon his warranty to such

subsequent holder, without presentment for payment or notice of non-payment.

EVIDENCE IS ADMISSIBLE TO SHOW THAT DRAWERS OF CHECK INTENDED TO MAKE IT PAYABLE TO PAYEE OF ANOTHER CHECK, but by mistake the names of the payees were misspelled, instead of to fictitious persons, so that the holder could use it without their indorsement.

ACTION by Andrew Turnbull against Marck Bowyer and Pierre Routey, as indorsers of a check. One John S. Martin drew his check for \$568.70, on the Ocean Bank of New York City, payable to the order of Richmond and Holman, and inclosed the same in a letter addressed to the payees. One Miaglia in some way obtained possession of the check, and gave it to Ball, Black, & Co., in payment of a watch and chain, receiving their check for the difference, \$453.70, payable to the order of "Kierhmon and Holmes." Evidence was received, against the defendants' objections, to show that the latter check was intended to be made payable to "Richmond and Holman," and the clerk was so directed to fill it out, but that he made a mistake in the spelling of the names. Miaglia procured this check to be certified, and offered it, with the names "Kierhmon and Holmes" indorsed thereon, to the defendants, merchant tailors, in exchange for clothes. The defendants were told, upon inquiry, by Ball, Black, & Co., that the check was good. One of the defendants indorsed the check in the presence of Miaglia, and presented it to the receiving-teller of their own bank for deposit. The teller inquired of him whether he knew the payees, and upon being informed that he did not, but that he knew Ball, Black, & Co., and they said the check was all right, the teller told him not to take it. Thereupon Miaglia, without objection, took the check, with the defendants' indorsement thereon, put it in his pocket, and went off. Miaglia subsequently gave the check to the plaintiff, on purchasing a bill of goods. There being no such firm as "Kierhmon and Holmes," and Richmond and Holman not having indorsed the check, the plaintiff was compelled to reimburse the transferee, and now seeks reimbursement from the defendants. It did not appear that the check had been presented to the makers for payment. The defendants' counsel asked the court to charge,—1. That if the jury believed that the check of Ball, Black, & Co. was obtained from them by the felony of Miaglia, the defendants were not liable to the plaintiff on the indorsement, although the plaintiff paid a consideration; 2. That if Miaglia took the check indorsed by the defendants from them without their consent, and feloniously, the defendants were not

liable to the plaintiff; and 3. That if the indorsement of "Kierhmon and Holmes" was intended for "Richmond and Holman," the defendants were not liable without proof of demand of payment of the check. But the court charged that the only question for the jury to determine was, whether the signature of the payees indorsed on the check of Ball, Black, & Co. was genuine or a forgery. If they found the indorsement was forged, they should find for the plaintiff; but if genuine, for the defendants. The jury returned a verdict for the plaintiff. The general term of the supreme court overruled exceptions taken, and ordered judgment on the verdict. The defendants appealed.

Francis Byrne, for the appellants.

Wheeler H. Peckham, for the respondent.

By Court, MASON, J. In the case of commercial paper, a *bona fide* purchaser gets a good title, although it may have been stolen, and is transferred by the thief: Edwards on Bills and Notes, 308-310, and cases there cited. This check was not stolen, however, from the defendants, and they, without any objections made, allowed Miaglia to receive it and depart, after they had indorsed it in blank. As to all subsequent *bona fide* holders, therefore, they must be regarded as indorsers. The rule is well settled also that an indorsement of commercial paper is a contract with every subsequent holder,—that the instrument itself and all the antecedent signatures thereon are genuine: Story on Promissory Notes, secs. 135, 379, 380, 387, and cases there referred to.

The plaintiff was proved to be a *bona fide* purchaser of this check; and as the judge submitted the question whether the indorsement of the payees was genuine or a forgery to the jury, and the jury found that such indorsement was a forgery, the liability of the defendants to the plaintiff was fully established. The plaintiff having purchased this check of Miaglia, in good faith, and paid value for it, there was an implied warranty in law on the part of the defendants to the plaintiff, as holder, that the indorsement of the payees was genuine. The plaintiff acquired no title to the check as against Ball, Black, & Co., and was entitled to recover of the defendants the amount of the check, upon their implied warranty. The plaintiff was under no obligation to protest the check, and the defendants have lost nothing by his omission to do so. The

defendants' liability was fixed before presentment of the check. They contracted that the signature of the payees was genuine, and it turned out to be a forgery; that alone rendered them liable: *Goddard v. Mechanics' Bank*, 4 N. Y. 147. The judge committed no error in refusing to charge the first request of the defendants, for the reason that there was no evidence in the case that would have justified any such finding by the jury; and besides, as to negotiable paper, the rules of law would not justify such a charge. If the signatures of all the prior parties to the check were in fact forged by Miaglia, the defendants are notwithstanding liable, as by their indorsement they impliedly guarantee the genuineness of all the prior signatures to the paper.

The next request is equally untenable; first, for the reason that the evidence would not justify a verdict that Miaglia feloniously, and without the consent of the defendants, took the check with their indorsement from them, and the defendants' liability would not be changed, even did he take the check without their consent; but it is apparent that he did not do so. The defendants indorsed the check in the presence of Miaglia, and presented it to the bank; and the cashier inquired of the defendant presenting the same if he was acquainted with the payees; and when he told the cashier he was not, but that he knew Ball, Black, & Co., and they said the check was all right, the cashier, finding that they did not know the signatures of the payees, and whether the same was genuine, very properly advised the defendants not to have the check cashed; and thereupon Miaglia took the check and put it in his pocket, without any objection from the defendants. The defendants had paid nothing for the check; and as regards them, the check belonged to Miaglia, and if they saw fit to allow him to take it, and retain it with their indorsement upon it, they must be held liable to any subsequent holder in good faith as indorsers of the check. The third request to charge is wholly untenable, when the indorsement of the payees is found by the jury to be a forgery, as we have shown. No error was committed in the charge. There was certainly nothing in the case that should have put the plaintiff upon inquiry as to this indorsement of the payees.

The evidence to show that Ball, Black, & Co. intended to make this check payable to the payees in the Martin check, which they then received from Miaglia, and that the clerk was so directed to fill it out, was properly received. The evi-

dence had no materiality, so far as it went, to explain the discrepancy in the spelling of these names; but it was material to show that it was not intended to make it payable to Miaglia, or to fictitious persons, so that Miaglia could use it without the indorsement of the payees. Miaglia was a stranger to them, and they took the precaution, probably, to make their check payable to the indorsers upon the check which they received from him, so that he would have to procure their indorsement before using it. The case of *Coggill v. American Ex. Bank*, 1 N. Y. 113 [49 Am. Dec. 310], shows that this evidence was competent. That this evidence was competent is pretty apparent, I think, to the appellant's counsel, for it furnishes a perfect answer to his fourth point made upon this appeal, which is, that this check was payable to fictitious persons, and Miaglia could transfer it so as to give a good title without any indorsement. The judgment of the superior court was right, and should be affirmed.

All the judges concurring, judgment affirmed.

INDORSER OF NEGOTIABLE PAPER WARRANTS GENUINENESS OF PRIOR SIGNATURES: *State Bank v. Tearing*, 28 Am. Dec. 265; *Weakley v. Bell*, 36 Id. 116; *White v. Continental National Bank*, 64 N. Y. 320; *Dalrymple v. Hillenbrand*, 52 Id. 9, both citing the principal case; although the indorsement is "without recourse": Note to *Watson v. Chesire*, 87 Am. Dec. 390; *Dumont v. Williamson*, 98 Id. 186.

THE PRINCIPAL CASE IS CITED in *Lindley v. Diefsendorf*, 43 How. Pr. 359, to the point that the purchaser of a county bond, payable to bearer in good faith for value, and without notice, gets a good title; and in *Smith v. Sac Co.*, 11 Wall. 150, *per* Clifford, J., dissenting, to the point that holders of coupons indorsed in blank, or made payable to bearer, stand upon the same footing as holders of bills of exchange or promissory notes; but it is disapproved in *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 211, 213, S. C., 12 Week. Dig. 420, 421, in holding that the indorsement of a draft by an accommodation indorser was not a guaranty of the genuineness of the draft.

CROMWELL v. HEWITT.

[40 NEW YORK, 491.]

ONE WHO WRITES HIS NAME ON BACK OF NON-NEGOTIABLE NOTE IS LIABLE AS GUARANTOR OR MAKER to the holder thereof, and is not entitled to have the notes presented for payment when due, or to be given notice of non-payment.

ACTION to charge the defendant as guarantor of two non-negotiable notes. The facts are stated in the opinion.

R. H. Underhill, for the appellant.

Rufus B. Cowing, for the respondent.

By Court, MASON, J. This action was brought to recover of the defendant the amount of two non-negotiable notes of seventy-five dollars each, upon the following facts: One William Ryan made the notes payable to the defendant by name, and the defendant transferred the notes to the plaintiff for value, and indorsed them over by writing his name upon the back. The notes were not presented for payment when they fell due, nor was any notice of non-payment given to the defendant, and the only question in the case is, whether the plaintiffs are entitled upon these facts to recover of the defendant the amount of the notes. The case of *Richard v. Warring*, 1 Keyes, 575, is an authority in point, and decides the very question in favor of the plaintiffs. The case holds that the holder may overwrite the indorser's name with a contract of guaranty, or as maker of the note. That case must be regarded as controlling, even should we think the reasons assigned for the decision unsatisfactory.

The judgment of the supreme court must be reversed, and a new trial granted, with costs to abide the event.

LIABILITY OF ONE WHO WRITES HIS NAME ON BACK OF NON-NEGOTIABLE NOTE: See *Riddle v. Stevens*, 87 Am. Dec. 181, and note. The writing by one of his name across the back of a non-negotiable note is not legally an indorsement of the note: *Cawley v. Costello*, 15 Hun, 304; and such person is not entitled to require that immediate demand of payment be made, and notice of non-payment given: *Newman v. Frost*, 52 N. Y. 428. The writer is liable as a maker of the note or a guarantor of its payment: *McMullen v. Rafferty*, 24 Hun, 364, affirmed in 89 N. Y. 458; S. C., 15 Week. Dig. 198; *Roe v. Hallett*, 34 Hun, 128; S. C., 20 Week. Dig. 34; *Little v. Rawson*, 8 Abb. N. C. 258; *Rothschild v. Griz*, 31 Mich. 154. The principal case is cited to the above points.

BRADLEY v. ALDRICH.

[40 NEW YORK, 504.]

LEGAL RELIEF OF DAMAGES CANNOT BE AWARDED UNDER CODE, IN ACTION SEEKING FOR EQUITABLE RELIEF ONLY, damages being neither alleged in the complaint nor claimed upon the trial, where the court finds that the plaintiff is not entitled to equitable relief, but certain facts appear which would warrant an action by the plaintiff for damages.

ACTION seeking the rescission of an executed agreement by which the plaintiff was to convey and deliver to the defend-

ants a farm and some sheep, in return for certain village lots and a sum of money, on the ground of fraudulent representations concerning the number, situation, condition, and value of the lots. One of the lots had been previously sold by the defendants to one Webb, and the bond and mortgage executed by him were transferred to the plaintiff. The judge, who tried the case at special term, filed a decision in which he stated that the plaintiff had failed to satisfy him of the frauds alleged, but in which he found that "Aldrich falsely represented him [Webb] to be good; and for this he is liable, and plaintiff is entitled to judgment for whatever damages he has in that respect alone sustained; and for the purpose of ascertaining such damages, there must be a reference to Judge Griswold to take proofs and report." The damages having been ascertained, judgment for their amount and costs of the action was entered for the plaintiff. The defendant, Aldrich, appealed to the general term, and the plaintiff's complaint was dismissed with costs to the defendant, but without prejudice to the right of the plaintiff to bring an action at law, if so advised. The plaintiff thereupon appealed to this court.

George Bartlett, for the appellant.

Hotchkiss and Seymour, for the respondent.

By Court, WOODRUFF, J. The order and judgment of the general term of the supreme court, whereby the judgment at special term was reversed, was entered in July, 1859. By the provisions of the code, at that time in force, the questions, whether of fact or of law, arising upon the trial of an action by the court, could only be reviewed in the manner prescribed by section 268, to wit, "the questions of law in every stage of the appeal, and the questions of fact upon the appeal to the general term of the same court."

It appears by the opinion assigning the reasons for the reversal of the judgment in this case, that the court in general term were of opinion that the evidence was not sufficient to warrant any finding that the defendant made any fraudulent representations, or that the plaintiff was induced to make the exchange by any representations touching the responsibility of the purchaser of the village lot, or that the plaintiff was in that respect defrauded, and therefore that "the evidence in the case does not justify the judgment which was given."

If, therefore, the code had remained unchanged, it would be

a serious question whether this appeal ought not to be dismissed on the ground that we have no jurisdiction to review the determination which was actually made by the general term.

But by the amendment of 1860, it is explicitly enacted that a judgment on trial by the court shall not, in the court of appeals, be deemed to have been reversed upon questions of fact, unless so stated in the judgment of reversal, and this provision is made to apply to appeals then pending, as well as to those thereafter brought.

We are, therefore, in the face of the declared opinion of the general term that the evidence was wholly insufficient to sustain the conclusions of the court at special term, compelled to treat the reversal as having been ordered for error in law, and to review the case upon that assumption.

No doubt if the defendant had desired to insist that the reversal in the general term was upon the questions of fact, he would, after the act of 1860, have been permitted to procure an amendment of the judgment of the general term, so as to conform to the opinion of the court in that respect, and cause the same to be filed here as part of the record.

No such amendment having been made, the review here is necessarily confined to the questions of law. It may be that the defendant has preferred that the case be thus reviewed, for the reason that if it were assumed or stated in the judgment that the reversal was upon the ground that the evidence did not sustain the findings of fact, the propriety of ordering judgment final for the defendant, instead of ordering a new trial, would have been open to discussion and to very serious doubt, for *non constat* that on a new trial the plaintiff would not have furnished ample proof to sustain his allegations.

What, then, are the questions of law raised upon the trial, or open to review here?

No exception was taken by the appellant to any ruling of the court in receiving or rejecting testimony. The exceptions taken to the decision of the court are mainly to the findings of fact.

But the exceptions may be said to present a question of law, or perhaps two questions of law, in this, that the appellant below excepts to the conclusion that the defendant is liable, and the plaintiff entitled to judgment for the damages sustained by reason of the false representation that Webb, the said purchaser, was good, and the award of a reference to

ascertain such damages. And the ground stated in the exception is, that such decision is against law and the uniform practice of courts of equity; that the justice had not jurisdiction to order such a reference; that the court, after an express finding that there was no ground for equitable relief, had no right to try a simple question of fraud, and assess or cause to be assessed the damages therefor; but that a trial of such an issue could (unless the defendant consented) only be tried by a jury.

It is clear that this action, begun and tried as an action in equity, seeking upon various allegations equitable relief, and equitable relief only, viz., the rescission of an agreement, and the restoration of the parties to their former condition, has ended as an action on the case for deceit, and an award of damages therefor; which is "an action for the recovery of money only": Code, sec. 253.

It cannot be said that the defendant, by going to trial before the court without objection, waived his right to object to the trial of a mere action to recover damages for deceit without a jury; for the action was not "an action for the recovery of money only," Code, sec. 253, but for special, equitable relief, and was therefore "triable by the court": Id., sec. 254. He therefore had no alternative, and had no right to object to the trial of the cause by the court.

Scott v. Barlow, 24 N. Y. 40, does not conflict with this view. There the complaint was "framed for the specific performance of an agreement; and in default thereof, for compensation in damages." The opinion pronounced in that case held that on the face of the complaint there was no ground for specific performance, and the case in truth therefore presented a cause of action for damages, and nothing more. The defendant therefore went to trial to meet that precise claim. *Greason v. Keteltas*, 17 N. Y. 491, was like *Scott v. Barlow*, *supra*, in that respect.

It does not appear that the plaintiff at any time treated the action as brought to recover damages. No such idea could be suggested by the complaint; no such claim appears to have been made at the trial. The plaintiff does not, in his complaint, aver that he has sustained any damages from the representation, and it is quite obvious that he did not prove or attempt to prove his damages from this cause, else a reference to ascertain whether he had sustained any and how much damages would not have been necessary.

It is certain that the former practice of the court of chancery furnishes no warrant for such a proceeding. When all ground for equitable interposition failed, the bill was dismissed; and if a cause of action at law appeared to arise out of the transaction, which rested in no equitable, but simply in legal, jurisdiction, the party was left to pursue his remedy in the appropriate forum.

The code, however, in section 275, provides that "the relief granted to a plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue. This section relieves a plaintiff from any technical objection that he has not prayed for the precise relief to which, on the trial, it may seem he is entitled, but the relief to be granted must still be consistent with the case made by the complaint.

And in construing and applying this section, another equally peremptory must be kept in view, which rests upon the right to trial by jury, secured to the party by the constitution. By section 253, "an issue of fact, in an action for the recovery of money only, . . . must be tried by a jury, unless a jury trial be waived," as provided in section 266.

Now, it was not the intent of section 275 to violate this section, and enable a plaintiff to compel a trial by the court by merely alleging some ground for equitable relief, and failing in that, have a trial of issues in an action for fraud, and an assessment of damages therefor without a jury. Nor will it warrant the court in disappointing the expectation and claims of both parties, trying the action and deciding it, so far as it is equitable in its nature, by denying the plaintiff's claim; and then selecting of facts found, some of which may warrant an action for damages, which the plaintiff has neither alleged nor claimed, and then order an assessment by a referee, and judgment for such damages as may be assessed.

The defendant here had a right to a trial by jury of the questions upon which the judge, at special term, gave judgment against him; he had a right to know, in some stage of the action, that some claim for damages, on the ground of fraud, was made against him; he was entitled to an opportunity to object that, as to such an issue, he was entitled to a trial by jury, and to demand such trial.

According to the record before us, he was not apprised of any such claim until its declaration, and its maintenance appeared in the decision of the judge; and to that he excepted, which alone he could do.

The opinion, in this court, in *Mann v. Fairchild*, 2 Keyes, 111 et seq., is, that "if a party brings an equitable action even now, when the same court administers both systems of law and equity, the party must maintain his equitable action upon equitable grounds or fail, even though he may prove a good cause of action at law on the trial": See also *Heywood v. Buffalo*, 14 N. Y. 540.

If it were material, it might be further suggested that the decision of the judge does not itself show a cause of action for which the damages could properly be awarded. His finding is simply that "Aldrich falsely represented him [Webb, the purchaser of one of the lots] to be good; and for this he is liable, and plaintiff is entitled to judgment for whatever damages he has, in that respect, sustained." Here is no finding of any fraud; no finding that the plaintiff was deceived, nor of an intent to deceive, though deceit is of the gist of such an action, and no finding that the plaintiff sustained any damages.

It may be true that where two causes of action, one legal and one equitable in their nature, are stated in the same complaint, the court may try the cause, and if the defendant, having just opportunity, does not demand a jury for the trial of such of the issues as the code and the constitution both require to be tried by the jury, he may be held to waive a trial by jury. But he must have just opportunity before such waiver can be implied, and it is not to be overlooked that the code itself, declaring how a jury trial may be waived, does not make mere appearance such a waiver, but "oral consent in open court, to be entered in the minutes."

If it could fairly be said that the present complaint stated two causes of action, of which one was for damages for deceit, it would have been, probably, within the power of the general term to reverse the judgment, and order the issues, in that respect, to be tried by a jury. That may be done where causes of action, legal and equitable, are properly united in the same complaint.

But I do not think that this action presents such a case, and the judgment appealed from should, therefore, be affirmed, with costs.

HUNT, C. J., and MASON, JAMES, DANIELS, JJ., were for affirmance, on the grounds stated in WOODRUFF's opinion.

MASON, J., also thought the case came under section 171 of the code, and there was a total failure of proof under that section.

GROVER, J., thought the code authorized the uniting of legal and equitable causes of action arising out of the same transaction. In this case the general term should have ordered a new trial. The order should be affirmed as to reversal of the judgment, and reversed so far as it ordered final judgment for the defendant.

The order was affirmed on the ground the complaint did not state any other cause of action than the equitable one, and there was a total failure of proof as to that.

The court agreed, unanimously, that causes of action, both legal and equitable, arising out of the same transaction, may be united by proper allegations in the complaint.

Order affirmed, and judgment absolute for the defendant.

LEGAL RELIEF OF DAMAGES CANNOT BE AWARDED UNDER CODE, IN ACTION SEEKING FOR EQUITABLE RELIEF ONLY: *Wheelock v. Lee*, 74 N. Y. 500; S. C., 5 Abb. N. C. 85; *Brinckerhoff v. Bostwick*, 105 N. Y. 572; *Beck v. Allison*, 4 Daly, 445; it is a cardinal rule that the pleadings of the party to whom relief is awarded must be sufficient to warrant the relief: *Sigourney v. Zellerbach*, 55 Cal. 440; but the plaintiff may have any relief consistent with the case made by his complaint, and embraced within the issues, but can have no other relief: *Hale v. Omaha National Bank*, 49 N. Y. 632; *Stevens v. Mayor etc. of New York*, 84 Id. 305; S. C., 12 Week. Dig. 59; *Andrew v. New Jersey Steamboat Co.*, 11 Hun, 494; *Seeley v. New York National Exchange Bank*, 8 Daly, 405; *Phelps v. Wood*, 46 How. Pr. 5; *Price v. Brown*, 10 Abb. N. C. 71; S. C., 60 How. Pr. 515; *Eberhardt v. Schuster*, 10 Abb. N. C. 390. The foregoing cases cite the principal case.

CAUSES OF ACTION, LEGAL AND EQUITABLE, ARISING OUT OF SAME TRANSACTIONS MAY BE UNITED UNDER CODE: *Sternberger v. McGovern*, 56 N. Y. 20; S. C., 15 Abb. Pr., N. S., 271; *Stevens v. Mayor etc. of New York*, 84 N. Y. 305; S. C., 12 Week. Dig. 59; *Carter v. De Camp*, 40 Hun, 259; S. C., 9 Civ. Proc. Rep. 220; 24 Week. Rep. 260; *Wager v. Wager*, 23 Hun, 443. The only consequence being that all must be tried by a jury: *People v. Albany etc. R. R.*, 57 N. Y. 174; *Bucher v. Carroll*, 19 Hun, 621. If the complaint sets forth a cause of action for specific performance of a contract to convey land, and a cause of action for damages for breach of contract, in case the contract cannot be performed, if upon the trial it turns out that the equitable relief cannot be had, the plaintiff can yet recover his damages, if he is entitled to any: *Margraf v. Muir*, 57 N. Y. 159; *Lawrence v. Saratoga R. R.*, 36 Hun, 477. The principal case is cited to the foregoing points.

THE PRINCIPAL CASE IS ALSO CITED AS FOLLOWS: In *Devlin v. Fitz*, 5 Daly, 102, and *Page v. Cameron*, 11 Week. Dig. 478, to the point that where the only

question in a case is one of damages, it should be tried by a jury, unless the defendants waive the jury; in *Hutchins v. Smith*, 63 Barb. 254, to the point that where the defendants in a case might have had the issues tried by a jury, they must be held to have waived the jury by voluntarily bringing the case to a hearing before the court; and in *People's Bank v. Mitchell*, 73 N. Y. 415, to the point that where an action at law is brought, and the case tried upon such an issue, it is too late to convert the action into one for equitable relief, even if such an action would lie. It is distinguished in *Nason v. Luddington*, 55 How. Pr. 343, as not being in conflict with the theory that the oath of a referee to faithfully and fully try the issues may be waived by the acts and acquiescence of the parties; and it is referred to in *Lanz v. Trout*, 46 Id. 95, on the point that the code has made no provision authorizing the court to deal with the question of costs, but the costs are chargeable to the plaintiff where an equitable defense is successfully interposed to a legal action.

MILLS v. MILLS.

[40 NEW YORK, 542.]

CONTRACT IS VOID AS AGAINST PUBLIC POLICY, AND WILL NOT BE ENFORCED, where the consideration is, that one of the parties thereto would give "all the aid in his power, spend such reasonable time as may be necessary, and generally use his utmost influence and exertions to procure the passage into a law" of a bill introduced into the legislature.

ACTION for the specific performance of a contract to convey certain real estate, brought by William T. Mills against David S. Mills. The complaint was dismissed by the court at special term, upon the ground that the agreement, which is sufficiently stated in the opinion, was illegal and void. Judgment having been affirmed at general term, the plaintiff appeals to this court.

Samuel D. Morris, for the appellant.

Albert Matthews, for the respondent.

By Court, HUNT, C. J. The question of the effect of agreements of this character has been recently considered in this court: *Lyon v. Mitchell*, 36 N. Y. 235 [93 Am. Dec. 502]; see also the dissenting opinion of Judge Grover at page 682. The agreement in question is founded upon an undertaking on the part of the plaintiff, reciting that a bill was pending in the senate, which granted unto the plaintiff a certain railroad franchise in the city of Brooklyn, and promising "to give all the aid in his power, spend such reasonable time as may be necessary, and generally to use his utmost influence and exertions

to procure the passage into a law of the bill heretofore introduced into the senate of the state of New York." It was further agreed that the said bill should be so amended as to limit the grant therein to the parties to this agreement; or that it should be amended as, from time to time, should be agreed by the said parties; and, when passed, the right should be transferred to David S. The plaintiff further agreed that he would not "co-operate or conspire" with any other person, or give any aid or countenance to the introduction into the legislature by any other person of a similar proposition.

It is not suggested that the plaintiff was a professional man, whose calling it was to address legislative committees. It is not suggested that he had any claim of right, which he proposed to advocate, and which right or debt he proposed to transfer to the defendant. He had simply asked of the legislature the privilege or favor to be granted to him of building and operating a railroad, upon certain streets of the city of Brooklyn. This privilege may be assumed to be of pecuniary value. To procure the passage of such a law for the benefit of the defendant, he undertook to use his utmost influence and exertions. This contract is void as against public policy. It is a contract leading to secret, improper, and corrupt tampering with legislative action: See *Lyon v. Mitchell*, 36 N. Y. 235 [93 Am. Dec. 502], and cases cited; see also *Fuller v. Dame*, 18 Pick. 479; *Sedgwick v. Staunton*, 14 N. Y. 289; *Frost v. Belmont*, 6 Allen, 159; *Powers v. Skinner*, 34 Vt. 281 [80 Am. Dec. 677]. It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character, and fatal to public confidence in its action: *Clippinger v. Hepbaugh*, 5 Watts & S. 315 [40 Am. Dec. 519]; *Fuller v. Dame*, 18 Pick. 479.

The case was correctly decided, and the judgment should be affirmed.

All the judges concurred in the result.

MASON, J., thought it the duty of the court to construe a contract as innocent, unless it appears affirmatively that it was for a corrupt purpose.

Judgment affirmed.

CONTRACTS TO RENDER SERVICES AS LOBBYIST ARE VOID: Note to *Parsons v. Trask*, 66 Am. Dec. 506; *Powers v. Skinner*, 80 Id. 677, and note; *Lyon v. Mitchell*, 93 Id. 502, 506, and note. Public policy and sound morality imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every act, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the trust of legislation is confided: *Harris v. Simonson*, 28 Hun, 319, citing the principal case; and it is not necessary that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had; it is enough that the contract tends directly to these results: *McKee v. Cheney*, 52 How. Pr. 146, quoting the principal case.

THE PRINCIPAL CASE IS REFERRED to in *Oscanyan v. Arms Co.*, 103 U. S. 275, S. C., 2 Trans. Rep. 711, on the point that a contract by the consul-general of a foreign government to use his influence with an agent of that government sent to examine and report in regard to the purchase of arms, in favor of a certain manufacturing company, will not be upheld; and it is cited in *Atchison v. Mallon*, 43 N. Y. 149, to the effect that agreements, which in their necessary operation upon the action of the parties to them tend to restrain their rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principle of sound policy, and are void.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

MILLER v. MILLER.

[60 PENNSYLVANIA STATE, 16.]

WHERE TENANT IN COMMON IS IN POSSESSION, and by will bequeaths the whole estate, in the presence of his co-tenant, who acts as a subscribing witness to the will, this is an open and unequivocal claim of adverse possession to the whole tract, and amounts to an ouster of the co-tenant.

WHERE ONE BY EXPRESS AGREEMENT encourages another to settle on land, and go on and improve it, and expend money and labor upon it, neither he nor his heirs can afterwards take the land from the one making the improvements, though the former may have the older and better title, and be ignorant of their rights.

THE opinion states the facts.

Purman and Sayers, for the plaintiff in error.

Wyly and Buchanan, and Waddell, for the defendant in error.

By Court, SHARSWOOD, J. The first error assigned is to the charge of the learned judge below on the question of ouster. The plaintiff in error complains that the question of fact involved was entirely taken from the jury. The court said: "The making a sale or a will giving his estate to his children as was done in this case, the will being witnessed by George Miller (the co-tenant and plaintiff), would be a decisive, open, unequivocal act." At the same time that they gave this instruction, they said, in affirming the plaintiff's fourth point, "that in order to constitute an ouster of tenants in common or copartners, there must be something more than the mere continuance of possession or perception of profits and payment of taxes; viz., there must be such acts as denying the

right of his co-tenants, or other unequivocal acts resisting and setting at defiance his co-tenants or copartners."

Taking the whole together, the instruction was, that the making of a will, such as that given in evidence, was such an act. This will gave directions that his farm should be rented out, and its proceeds applied to the benefit of his family until his youngest daughter became eighteen years of age, and then his real estate was to be equally divided by metes and bounds, quantity and quality, among his children. It was clearly inconsistent with a devise of an undivided interest. In *Culler v. Motzer*, 13 Serg. & R. 356, it was held that a sale by one tenant in common of the whole tract is an ouster. In *Lodge v. Patterson*, 3 Watts, 74, the defendant, immediately after the death of his brother and co-tenant, put up his interest at public sale, bought it in, and then had a survey made in his own name. In *Dikeman v. Parish*, 6 Pa. St. 226, leasing, devising, and conveying lands are mentioned as the highest acts of dominion over the property. The uncontradicted evidence in this case showed that the co-tenant and plaintiff was a subscribing witness to the will, and according to the testimony of Elizabeth Miller, the will was read in his presence. There could not have been a more open and unequivocal claim of an adverse title to the whole tract, and if the jury believed the evidence, they were bound to find an ouster. Upon a fair construction of the whole charge, this is what the court instructed the jury.

The second error assigned is to the answers to the defendant's first and second points. The substance of them was, that if the jury believed that the facts alleged and set forth in them were sustained and made out by the evidence, the statute of frauds formed no objection to the defendant's title. These facts were, that Jacob Miller, the father of the plaintiff and grandfather of the defendant, had settled on a tract of patented land; that, becoming old and infirm, he agreed with his son, William Miller, that if he would support him and his wife as long as they lived he should have the land; that to obtain a title William should apply for and take out a warrant in his own name, and procure thereon a survey and patent; that William accordingly procured a warrant, caused a survey to be made, and paid the greater part of the purchase-money to the commonwealth; that he built a dwelling-house, stable, barn, and other improvements, and that he fully performed his agreement in supporting his father and mother

during their lives. Now, if Jacob Miller had been a settler on unappropriated land, and William had been an entire stranger, and had obtained a title from the state, and gone on and made improvements with the assent and encouragement of Jacob, can it be doubted that he would have been estopped? When a man encourages another to settle on land and to go on and expend money and labor, he shall not afterwards take the land from the improver, though he has an older and better title, even though he was ignorant of his rights. To that effect are the cases of *McCormick v. McMurtry*, 4 Watts, 195; *McKelvey v. Truby*, 4 Watts & S. 323. This is a stronger case, for there was evidence here of an express agreement; it was not mere assent and encouragement. Jacob Miller had no settlement right; he had no title but bare possession; good indeed against all the world but the grantees of the commonwealth. This possession was all that he agreed to give his son,—it was all he had to give,—that he might procure a title from the state; both parties evidently supposing that such a title would be available. On the faith of this agreement William went on and fulfilled his contract,—took out the warrant, and expended money in labor and improvements. If these facts were so, the jury were bound to find that Jacob Miller, the father, would be estopped from controverting William's title, or setting up an outstanding title in the prior patentees; and of course his heirs claiming in privity from him are subject to the same equitable disability.

Judgment affirmed.

OUSTER OF ONE CO-TENANT by the other, what constitutes: *Warfield v. Linnell*, 77 Am. Dec. 614; S. C., 90 Id. 443; *Holley v. Hawley*, 94 Id. 350, and notes to these cases.

ESTOPPEL AS AGAINST OWNER TO ASSERT TITLE, where he allows another to make improvements and expend money on his land, with his consent: *Godeffroy v. Caldwell*, 56 Am. Dec. 360, and note 362; *Touque's Lessee v. Nutwell*, 79 Id. 649. As to improvements made under promise of afterwards acquiring title, see *Smith v. Adm'rs of Smith*, 78 Id. 49.

ONE WHO ENCOURAGES ANOTHER TO SETTLE ON LAND, and expend money on and improve it, cannot afterwards assert a better title to it: *Mason v. Kaine*, 67 Pa. St. 133. And one who purchases at official sale, through fraud, cannot hold it through the aid of technical rules of law: *Power v. Thorp*, 82 Id. 351, both citing the principal case.

SHENK v. PHILADELPHIA STEAM PROPELLER Co.

[60 PENNSYLVANIA STATE, 109.]

COMMON CARRIER BY RAILWAY must transport goods to the place of destination, and deposit them without delay or additional charge in his warehouse until the owner or consignee has reasonable time to remove them. He is not required to deliver at the door or place of business of the consignee, or to give notice of their arrival.

COMMON CARRIER'S RESPONSIBILITY LASTS UNTIL DELIVERY to the owner or consignee, or until that of some other party begins. But he may be both a carrier and a warehouseman, and he ceases to be the former when he has placed the goods in the warehouse, after which he is only liable for ordinary neglect.

CARRIER BY WATER MUST GIVE NOTICE to consignee of arrival of the goods.

COMMON CARRIER MUST TAKE CARE, at his peril, that the goods are delivered to the right person; a delivery to the wrong person renders him clearly liable for loss, for which trover will lie.

CARRIER MUST BE ABLE TO SHOW that the party to whom the goods were delivered as agent was authorized as such by the owner or consignee to receive them; otherwise, he is liable for their loss.

WHERE GOODS HAVE BEEN CARRIED BY WATER and landed at the wharf, the carrier is still liable as bailee, unless he can show that they have been lost without negligence on his part, or that of his agents or servants.

NON-DELIVERY BY CARRIER IS PRIMA FACIE PROOF of want of ordinary care, and casts the burden of proof on him.

WHAT NOT EVIDENCE TO DISCHARGE CARRIER. — Acceptance by one man of goods from a drayman is no evidence to constitute such drayman his agent so as to charge him with goods which the drayman received to deliver, but lost by the way.

CASE for loss of goods transported by water. The opinion contains the facts.

J. E. Gowen, for the plaintiffs in error.

J. W. and J. E. Latta, for the defendants in error.

By Court, SHARSWOOD, J. It is unnecessary to consider whether the plaintiffs in error would have been liable for the loss of the cotton for which the action was brought if their undertaking had been to forward it from the terminus of their own route to some other ultimate point of destination.

By the bills of lading the place of delivery was expressed to be "at their office in Philadelphia." The words inserted, "to Bitner & Bro., Lancaster, Pa., care of B. Bro., 1015 Market St., Philada.," as in the bill of November 8, 1865, or "to Bitner & Bro., Lancaster, Pa.," as in the two other bills, can only be regarded as a designation of the consignees to whom or to whose agent the delivery was to be made.

When the responsibility of a common carrier of freight ends, has been the subject of much discussion and some contrariety of opinion. Judge Story states the rule to be clear that carriers are bound to give notice of the arrival of goods to the persons to whom they are directed, and within a reasonable time: Story on Bailments, sec. 543. The American cases are not very harmonious, but perhaps the current of them sustains him. There are some qualifications of the rule growing out of the different kinds of carriage which are beginning to be generally recognized. A highly respectable court in New Jersey states, as the result of all the cases, that "the obligation of common carriers by railway is simply to transport the goods to the place of destination, to deposit them without delay and without additional charge in their warehouse until the owner or consignee has a reasonable time to remove them. They are not required, as carriers by wagon, to deliver at the door or place of business of the owner or consignees, nor as carrier by water, to give notice of their arrival. Their route, being confined to the track of their road, renders the first impracticable without the use of wagons, which is not part of the contract, and the usual certainty of the arrival of the trains renders the latter unnecessary, and by the usage of business it is not required": *Morris etc. R. R. Co. v. Ayres*, 29 N. J. L. 393. These distinctions seem founded in reason, and may perhaps reconcile the apparent conflict of authorities, and settle down at last as the true expression of the rule on this important subject. The responsibility of the carrier ought, it would seem, to last either until delivery to the owners or consignees, or until that of some other party begins. Transporters of merchandise may be both carriers and warehousemen, and they cease to be the former when they have placed the goods they have carried in a depot of their own, or any other safe warehouse. Their responsibility as warehousemen is, however, only for ordinary neglect: *Chicago R. R. Co. v. Warren*, 16 Ill. 502; *Illinois Central R. R. Co. v. Alexander*, 20 Id. 23.

The New York civil code lays down a much more stringent rule, for it provides, section 1105, that "if for any reason a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee at its arrival, and keep the same in safety, upon his responsibility as a carrier, until the consignees have had a reasonable time to remove it."

We are not without decisions of this court which illustrate

the subject. In *Cope v. Cordova*, 1 Rawle, 203, it was held in the case of a vessel arriving from a foreign port that the liability of the ship-owner ceases when the goods are landed at the usual wharf; but the reasons adduced in support of it do not apply to the internal or coasting trade, and the court expressly disclaim such an application. Accordingly it was decided in *Hemphill v. Chenie*, 6 Watts & S. 62, that the responsibility of a carrier on the Ohio River does not cease upon the delivery of goods on the wharf. In this case, as well as in *Eagle v. White*, 6 Whart. 505, it does not appear to have been considered that even notice to the consignee would relieve the carrier, but that there must be a tender made "at a proper time, in a proper manner, and at a proper place. If the tender is wanting in any of these essential requisites, his responsibility as carrier still continues." To the same effect is *Hill v. Humphreys*, 5 Watts & S. 123. In conformity to the qualification which I have before adverted to as recognized in some of our sister states, this court has also determined, in *McCarty v. New York and Erie R. R. Co.*, 30 Pa. St. 247, that when goods have been carried to their place of destination, and then deposited in the carriers' warehouse to await the owner's convenience in taking them away, the carriers are only subject in respect to such goods to the responsibilities of warehousemen, not to those of common carriers. The subject was also considered in *Tanner v. Oil Creek R. R. Co.*, 53 Id. 411, and the opinion expressed that it is the duty of the carrier to give notice whenever the consignee is known.

In the case before us, indeed, the transporters clearly recognize this to be their duty; for they expressly declare in the indorsement on the bill of lading that "the goods must be taken by the consignee immediately after notice of the landing of the same on the wharves, or the company will not be responsible for any loss or damage that may happen to them." However it might be if there was no such stipulation, it is very plain that in their own view their responsibility as carriers did not terminate until notice.

It is not pretended that they deposited the goods on their arrival in any warehouse, either of their own or any other person, or that they gave notice to the consignees or owners, but instead of that they delivered them to a master drayman, who employed subordinates to carry them to 1015 Market Street, the place named as the store of the consignees. Nine of the bales were never delivered, as the verdict settled.

The learned judge below left it to the jury to say whether the master drayman was the agent of the consignee, and they have found that he was not. Whatever doubt may hang over other questions as to the termination of a carrier's or other bailee's responsibility, there is one point which is indisputable, —that he must take care, at his peril, that the goods are delivered to the right person; for a delivery to a wrong person renders him clearly responsible: Story on Bailments, sec. 543; *Garrett v. Willan*, 5 Barn. & Ald. 53; though innocently and by mistake, as when it is made upon a forged order: *Lubbock v. Inglis*, 1 Stark. 83, 104; *Powell v. Myers*, 26 Wend. 591. Such a wrongful delivery has been held in many cases to amount to a conversion, and that trover may be maintained: *Stephenson v. Hart*, 4 Bing. 476; *Syeds v. Hay*, 4 Term Rep. 260; *Devreux v. Barclay*, 2 Barn. & Ald. 702; *Youl v. Harbottle*, Peake, 149; Stephens's *Nisi Prius*, 981. The carrier must show that the person to whom the goods were delivered as agent was duly authorized as such by the owner or consignee to receive them; for if he delivers to any but the owner, consignee, or agent, he does so at his peril: *Adams v. Blankenstein*, 2 Cal. 413. Either, then, the master drayman was a mere stranger, voluntarily assuming to accept and carry the goods to the consignee, in which case delivery to him was wrongful, or he was the agent of the carriers, and they assumed the same duty, and must be considered as undertaking to carry them from their wharf and deliver them to the agents of the consignee: *Smith v. Nashua and Lowell R'y Co.*, 27 N. H. 80. Admitting, which is the most favorable view which can be taken of their case, that their responsibility as common carriers ceased when the goods were landed at their office, they would still be liable as bailees, unless they proved that the goods had been lost without negligence on their part or that of their agents or servants; for it has been held by this court, in *Verner v. Sweitzer*, 32 Pa. St. 208, that a private carrier or ordinary bailee for hire, in case of the non-delivery of goods intrusted to him, is liable therefor, in the absence of proof of ordinary diligence, and that the fact of a non-delivery is *prima facie* evidence of want of ordinary care, and throws the burden of proof on the bailee. These principles show that the plaintiffs in error have no good reason to complain of the charge of the court below.

The refusal to answer as requested in their first point forms the subject of the first and second assignment of error. The

first was: "If the jury believe that the employment of Farmer to deliver goods at Atchinson's warehouse had been heretofore and was in this instance acquiesced in by Atchinson, the delivery by the defendants to Farmer was a delivery to the plaintiffs."

Certainly the acceptance by one man of goods from a drayman or porter is no evidence to constitute the porter or drayman his agent so as to charge him with goods which the porter or drayman received to deliver, but lost on the way. In *Ostrander v. Brown*, 15 Johns. 39, it was held that when goods were taken away from the wharf, on which they had been deposited by the carrier, by a cartman usually or always employed by the consignee, but without his orders in this instance, it was no evidence of the delivery of a part alleged to be lost, though then, as here, the largest part was received.

The answer to the second point forms the subject of the third and fourth assignments of error. It was: "If the jury believe the 126 bales of cotton arrived at Philadelphia, the contract between the plaintiffs and the company has been fulfilled, and the plaintiffs cannot recover." As we have seen, under the law and the special terms of the contract, the mere arrival of the goods at the office in Philadelphia did not discharge the carriers, and the learned judge might have directly negatived the point. His answer which affirmed it, but left to the jury to say whether the carriers had not assumed to transport and deliver the goods to the agent of the consignees, was more favorable to the plaintiffs in error than they had a right to ask. There remain to be considered the fifth and sixth errors assigned, which relate to the answer to the third point, which was: "If the jury believe the plaintiffs or their agents did not notify the company of the deficiency in the numbers of bales received by them until two or three weeks after it was known to them, the plaintiffs cannot recover." The point was very rightly declined, for certainly the indorsement on the bill of lading, "no damage allowed without being notified on receipt of the goods," by no interpretation can be extended to the case of goods not delivered at all, and so far as delay in making a formal demand bore on the question of fact submitted to the jury, it was very properly commented on by the learned judge.

Judgment affirmed.

and note 363; *McMillan v. Michigan etc. R. R.*, 93 Id. 208, note 230; *American Express Co. v. Hockett*, 95 Id. 691, and note 704.

DUTY OF COMMON CARRIER TO GIVE NOTICE to consignee: *Morgan v. Deble*, 94 Am. Dec. 264, and note 269; *Selma etc. R. R. Co. v. Butts*, 94 Id. 694.

COMMON CARRIER DELIVERS TO WRONG PERSON at his peril, and when he delivers to the agent of the consignee he must be able to show that he is the duly authorized agent; otherwise liability attaches to the carrier: *Adams v. Blankenstein*, 56 Am. Dec. 350, note 352.

COMMON CARRIER BY WAGON is bound to deliver the goods to the consignee, or at his residence or place of business, to end his liability; but a common carrier by water-craft may terminate his liability as such by giving notice of the arrival of the goods, at the usual place of delivery, to the consignee, and by caring for them for a reasonable time, to enable him to take them away: *McMasters v. Pennsylvania R. R. Co.*, 69 Pa. St. 377, citing the principal case.

EXPRESS COMPANY MUST DELIVER GOODS at the residence of the consignee, to him personally, or at his place of business, and within a reasonable time, and, if practicable, within business hours: *Union Express Co. v. Ohlman*, 92 Pa. St. 326, citing the principal case.

GERMANTOWN PASSENGER RAILWAY CO. v. FITLER.

[60 PENNSYLVANIA STATE, 124.]

POWER OF CORPORATION TO FORFEIT STOCK given it by charter must be strictly pursued, and if any restrictions or limitations provided have been disregarded, the forfeiture is invalid.

SUBSCRIBER TO STOCK AND MEMBER OF CORPORATION must be presumed to know the terms of his subscription.

IF CORPORATION FOLLOWS PROVISIONS OF ITS CHARTER relating to the forfeiture of stock, its right to forfeit it at the end of the time limited is perfect, and a stockholder who is in default can claim no further delay or any other notice than that prescribed and given.

ENTIRE CAPITAL STOCK OF CORPORATION is a trust fund for the payment of its debts.

UNPAID SUBSCRIPTIONS TO STOCK OF CORPORATION are part of its assets which are available in equity to creditors, and a general assignment for their benefit passes them to the assignee.

ASSIGNEE OF CORPORATION MUST BE ABLE TO SHOW that calls for unpaid capital stock have been duly made, and by proper authority, as he can only proceed in the name of the corporation, and must show that the provisions of the charter have been pursued.

EQUITY WILL COMPEL DIRECTORS OF CORPORATION to make calls for unpaid capital stock as required by the charter, whenever aid is invoked by creditors or their representatives.

INTERVENTION OF EQUITY FOR BENEFIT OF CREDITORS becomes indispensable when corporations cease to keep up their organization and abandon all action under their charter.

CORPORATION IS NOT NECESSARILY DISSOLVED BY INSOLVENCY, assignment for the benefit of creditors, or writ of sequestration. If it keeps up its

organization, it still exists, and its franchises and powers not capable of assignment must be exercised by it in subserviency to its legal and equitable obligations.

WHEN DEBTS OF CORPORATION REQUIRE IT TO MAKE CALLS for unpaid capital stock, it is its duty to make them as much as it is to collect other debts due it; its discretion in the matter relates only to the time and manner of making them.

FORFEITURE OF STOCK OF CORPORATION extinguishes all rights and liabilities of the share-holder and of the corporation to recover on it; and its creditors, by whom the money is needed, can object and invoke equity to prevent it or set it aside.

POWER TO MAKE CALLS FOR UNPAID STOCK in corporation is vested in its directors, and no one can object to its lawful exercise, except creditors or their representatives.

WHERE SHARE-HOLDERS OBJECT TO PAYMENT of their subscriptions under calls for unpaid stock to the treasurer of the corporations, they must tender the amount to its assignee; and if he refuses it, they would then be entitled in equity to be relieved from any attempted forfeiture.

EQUITY AIDS THE VIGILANT AND ACTIVE, but not those who sleep. Nothing can call the court into activity but conscience, good faith, and reasonable diligence.

THE opinion states the facts.

McMurtrie and Phillips, for the appellants.

Davis and Price, for the appellee.

By Court, SHARSWOOD, J. The Germantown Passenger Railway Company was incorporated, with a capital of four thousand shares of fifty dollars each, by act of assembly, approved April 21, 1858 (Pamph. Laws, 494); and by a supplement of March 22, 1859 (Pamph. Laws, 284), the stock was increased to ten thousand shares. The plaintiff below, after this supplement, became entitled to 250 shares, and paid in two installments of five dollars on each share. A third installment of the same amount he refused to pay, and the directors declared his shares forfeited. He filed this bill in the court below to have this forfeiture declared null and void, and the court decreed accordingly upon bill, answer, and proofs, and that the company should cause 250 shares of stock to be restored to the name of the complainant, subject to all lawful calls, and issue to him a certificate for said stock in usual form, upon his surrendering any certificate he may now hold to be canceled.

The grounds, upon which this decree was made, appear by the opinion below, and the course of the argument by the able counsel of the appellee, to be reducible to two. First, that no

notice was given to the plaintiff of the intention of the directors to forfeit the stock. "In analogy," says the opinion, "to proceedings in court, should not a rule to show cause first go against him, or a demand in the nature of a *scire facias* issue, which would give notice that at a place and on a day certain, judgment of forfeiture would be entered, if the alleged default was not repaired? We must look to the charter for the power of the directors to forfeit the stock. No doubt the power given must be strictly pursued, and if any restrictions or limitations there provided have been disregarded, the alleged act of forfeiture must be declared invalid. This is so for the special reason that it is one of those forfeitures against which, if regular, equity does not relieve: 1 Redfield on Railways, 214. By the fifth section of the charter of this corporation, it is provided "that if any stockholder shall omit, for the space of six months, to pay any installment which may be called for, the managers of the company may either declare the shares of stock on which the installments are unpaid as aforesaid to be forfeited, or may at their option bring suit to recover the said installments, with interest at the rate of twelve per cent per annum, as debts of a like amount are by law recoverable against the person or persons appearing by their books to be the owners of those shares." It is not pretended that the call was not duly made and published, that the plaintiff had not personal notice, and that six months had not elapsed before the forfeiture was declared. Where, then, is the provision of the charter that requires any other or further notice? The plaintiff, as a subscriber to the stock and a member of the corporation, must be presumed to know its terms. He knew, then, that he had six months to pay, but that at the expiration of that time his stock could be declared to be forfeited. That equity will not relieve against such a forfeiture has been a settled doctrine of the court ever since *Sparks v. Liverpool Waterworks*, 13 Ves. 428. The reasoning of Sir William Grant in that case admits of no answer. He considered the charter as a contract between the subscribers. "The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings, they could not be carried on. It is essential that the money should be paid and that they should know what is their situation. Interest is not an adequate compen-

sation, even among individuals, much less in these undertakings." It follows that at the expiration of six months, the time limited in the charter, the power of the managers to forfeit the stock was perfect, and the defaulting stockholder could claim no further delay or any other notice than he had already received.

The second ground of objection to the forfeiture is, that before the call in question was made, the company had made a general assignment for the benefit of its creditors, and that the call was unauthorized by the assignee. This, indeed, is the principal contention, and it has received, as it deserves, careful consideration. It is certainly an acknowledged principle that the entire capital stock of a corporation is a trust fund for the payment of its debts: *Wood v. Dummer*, 3 Mason, 308; *Mann v. Pentz*, 3 N. Y. 422. The unpaid subscriptions to its stock are a part of its assets, which can be made available in equity by the creditors, and therefore a general assignment for their benefit passes them to the assignee: *West Chester and Philadelphia R. R. Co. v. Thomas*, 2 Phila. 344. It is, however, but the assignment of a chose in action; and the legal title being still in the corporation, the assignee can proceed only in their name, and must be able to show that the provisions of the charter have been pursued so as to give the company the right,—in other words, that a call for the unpaid capital has been duly made, and by the proper authority. It was said by Chancellor Dessausure that where the funds of a corporation are not whole and tangible, but consist in the liability of the members to be assessed, a court of equity will lend its aid in favor of a creditor of the company, to assist him in enforcing the payment of installments required by the members, and will apply the fund so raised to discharge the debt. It is as if it were a subrogation to the rights of the company: *Hume v. Winyaw and Wando Canal Co.*, 1 Car. Law Jour. 217; and this language is cited with approbation in *Washington Beneficial Society v. Bacher*, 20 Pa. St. 429. A chancellor will consequently compel the directors to make the calls required by the charter, whenever his aid is invoked by creditors, or the representative of creditors. There is a moral obligation, both upon the officers and the stockholders, to use the property and claims of the company as far as they will reach, to satisfy the demands of creditors; and when the company cease to keep up their organization and abandon all action under their charter, then the intervention of equity becomes indispensable:

Henry v. Vermillion and Ashland R. R. Co., 17 Ohio, 187. The members of a corporation would not be allowed to shake off their responsibility by a dissolution any more than by a division of the paid-up capital among themselves: *Wood v. Dummer*, 3 Mason, 308. But a corporation is not necessarily dissolved by its insolvency; not, as has been held, by a writ of sequestration operating as a legal divestiture of all its available assets: *Mann v. Pentz*, 3 N. Y. 422; much less, it would seem, by a voluntary assignment for the benefit of creditors. If it keeps up its organization, it still exists in law, and its franchises and powers, not capable of assignment, must be exercised by it, but in subserviency to its legal and equitable obligations. The discretion of the managers, as has been well said, as to calls, is modal merely, relating to the time and manner of making payments. When the debts of the company require the calls to be made, it becomes the duty of the managers to make them, as much so as to collect other debts due to the company. It is not discretionary with them to say whether the debts of the corporation shall be paid or not, when they have the means at command: *Ward v. Griswold Mfg. Co.*, 16 Conn. 601. As a forfeiture of the stock extinguishes all the rights and liabilities of the shareholder,—all title of the corporation to recover what may be due upon it,—it follows that the creditors by whom the money is needed can object to such action, and invoke the interposition of a court of equity to prevent it or set it aside: *Small v. Herkimer Co. Mfg. Co.*, 2 N. Y. 330.

It would seem, from this course of reasoning, that it was the right and the duty of the assignee of the Germantown Passenger Railway Company to require the managers to make the calls necessary to enable them to settle with their creditors. He appears not to have considered the unpaid installments as assets coming to him under the assignments. He understood very well, however, that he took the course he did on his own responsibility. "When I found things going on well," as he states in his testimony, "I took the responsibility of letting Mr. Singerly and his road work themselves out of their difficulties." The event justified his confidence. Though he may not have assented to the calls, it is certain that with full knowledge he took no steps to prevent them, or the forfeiture of shares on non-payment. This was a power or franchise which, beyond all question, was vested in the board of managers, and no one had any right to object to its lawful

exercise, except creditors, or the representative of creditors. Had the stockholders objected to the payment of their subscriptions under the calls to the treasurer of the company, on the ground that they had notice of the assignment, their duty was to tender the amount to the assignee, and then if he had refused to accept it, they would have had a clear equity to be relieved from any attempted forfeiture.

The plaintiff below, so far from taking this course, appeared to have concluded that, because the assignee had not expressly authorized the call, he was not bound to pay any attention to it. If this were so, it was incumbent upon him promptly to take the proper measures to enjoin the proceedings. He could not sleep on his rights, and take the chances of a favorable turn of affairs. When the call was made, the stock was without market value. There were but two installments paid up, and each share was subject to a further call of forty dollars. Even the bonds of the company were not and could not be sold for fifty cents on the dollar. The last call was made October 3, 1860, payable on or before the 5th of November following. He lay by for three years, until the 10th of November, 1863, when he filed his bill in the court below. In the mean time, the company had emerged from its difficulties, paid its floating debts, and the stock had become valuable. He is now willing and desirous to take it, subject to all the unpaid installments. It would be strange equity to allow a party thus to speculate upon contingencies. The forfeiture relieved him from all the obligations of his subscription. Neither the company nor the assignee could have pretended to enforce those obligations. Thus he alone would be allowed to play fast or loose. Equity aids the vigilant and active, not the sleeping and indolent. "Nothing," in the language of Lord Camden, "can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive, and does nothing": *Smith v. Clay*, 3 Bro. C. C. 689, note.

Decree reversed, and now bill dismissed at the costs of the appellee.

CAPITAL STOCK OF CORPORATION is a trust fund for the payment of its debts: *Ohio L. I. & T. Co. v. Merchants' L. & T. Co.*, 53 Am. Dec. 742; *Hightower v. Thornton*, 52 Id. 412; *Payne v. Bullard*, 55 Id. 74.

UNPAID STOCK IS PART OF ASSETS of an insolvent corporation, which may be reached by creditors in equity: *Bridge v. Penniman*, 18 Am. Dec. 454, and note 462.

DISSOLUTION OF CORPORATION DOES NOT DEPRIVE STOCKHOLDERS or creditors of their rights in the property: *Folger v. Columbian Ins. Co.*, 96 Am. Dec. 747, and note 755.

CALLS FOR PAYMENT OF STOCK, HOW MADE, and liability of subscribers for: *Merrimac Mining Co. v. Levy*, 93 Am. Dec. 697, and note 700.

ASSIGNMENT BY, OR TEMPORARY SUSPENSION OF OPERATIONS, does not dissolve corporation: *State v. Commercial Bank*, 53 Am. Dec. 106, note 110; *Arthur v. Commercial etc. Bank*, 48 Id. 719, note 724.

POWER OF COURTS TO COMPEL PAYMENT OF SUBSCRIPTIONS, AND LEVY AND PAYMENT OF ASSESSMENTS, AT INSTANCE OF CREDITORS OF INSOLVENT CORPORATIONS. — The insolvency of a corporation does not extinguish its legal existence, or fix the lien of creditors upon the specific property in hand. A corporation is authorized to continue the management of its affairs, to deal with its property, and to assign it for value in the due course of business, notwithstanding its actual insolvency, so long as there is an honest intention and a reasonable expectation on the part of the company of redeeming its fortunes; and it is only when a corporation is about to defraud its creditors by waste of its assets, or when the insolvency of the company is hopeless, so that further prosecution of the enterprise would clearly be at the expense of the creditors, that the latter may interfere to protect their lien. The legal existence of a corporation can be cut short only through a forfeiture of its franchises, declared at the suit of the state granting them, or a surrender by act of the share-holders. In support of the above propositions, see Morawetz on Private Corporations, secs. 578, 636; *Moseby v. Burrow*, 52 Tex. 396; *Boston Glass Manufactory v. Langdon*, 24 Pick. 53; *Coburn v. Boston Paper Maché Mfg. Co.*, 10 Gray, 243; *Nimmons v. Tappan*, 2 Sweeney, 652. The test of insolvency is the absence of tangible property: *Ridge Turnpike Co. v. Peddle*, 4 Pa. St. 490. Nor is the insolvency of a corporation any ground for restraining the enforcement of subscriptions to its stock: *Dill v. Wabash Valley R. R. Co.*, 21 Ill. 91; *Protection Insurance Co. v. Ward*, 23 Conn. 408. It shows the more urgent reason why they should be collected. It is due to the creditors of the company that it should make available all its resources, and faithfully apply the proceeds to the payment of its debts: *Dill v. Wabash Valley R. R. Co.*, *supra*. And after the commencement of proceedings in bankruptcy against a corporation, the court can, by virtue of its authority, make or direct any assessment or call necessary for or preliminary to the collection of the assets, as fully as the directors or stockholders might have done if the corporation had not gone into bankruptcy. A provision in the subscription and the stock certificate that an unpaid balance was to be paid on the call of the directors, "when ordered by a vote of a majority of the stockholders themselves," does not prevent this power from being effectually exercised by the court: *Upton v. Hanebrough*, 3 Biss. 417. Unpaid subscriptions to the capital stock of a company are corporate property, which can be reached by the creditors in a court of equity, and this right exists entirely independent of any statutory provision. It is the amount of shares subscribed, and not the sums actually paid in, which constitutes the capital stock of a company. The subscription for stock is a debt which the corporation may call in to satisfy the creditors; and the right to have the unpaid stock called in to extinguish outstanding debts has been held to be as clear and strong after as before the dissolution of the corporation: *Eightower v. Thornton*, 8 Ga. 486; S. C., 52 Am. Dec. 412, note 427.

The capital stock of a corporation, both that which has actually been paid

and that which remains unpaid, is regarded in the law as a trust fund pledged for the debts of the corporation, and equity will enforce it by seeing that it is collected and applied: *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57; *Marr v. Bank of West Tennessee*, 4 Cold. 471, 477; *Executors of Gilmore v. Bank of Cincinnati*, 8 Ohio, 71; *Lane v. Nickerson*, 99 Ill. 284; *Sanger v. Upton*, 91 U. S. 56, 60. When a corporation becomes insolvent, the officers are trustees for creditors, whether such creditors be private persons or another corporation: *Southern Life Ins. Co. v. Lanier*, 5 Fla. 110. As long as the corporation is a going concern, under the management of its regular officers, a call duly made by the board of directors is usually a condition precedent to the liability of a share-holder to pay any part of his unpaid subscription: Taylor on Private Corporations, sec. 661. If the directors fail to make a call when the unpaid subscriptions are needed to pay the debts of the corporation, a court of equity, on the suit of a creditor, will compel them to do so: See principal case; *Dalton etc. R. R. Co. v. McDaniel*, 56 Ga. 191; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437; *Ogile v. Knox Ins. Co.*, 2 Black, 539; S. C., 22 How. 380; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 601. Ordinarily, however, to apply for the appointment of a receiver is the course pursued: See *Ogile v. Knox Ins. Co.*, *supra*. A bill in equity is an appropriate remedy. The fact that the stockholders agree in their contract to pay such per cent as the directors shall call for does not change the remedy, and require the creditors to apply for a *mandamus* against the directors to do their duty under the contract: *Dalton etc. R. R. Co. v. McDaniel*, 56 Ga. 191; but see *Queen v. Victoria Park Co.*, 1 Q. B. 288; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 601. The remedy in equity is more complete, and is the only appropriate and adequate remedy, where the bill alleges that the directors refuse to call in and collect the stock subscribed, and also that many stockholders are insolvent, some dead, some beyond the jurisdiction, and that the debts are of various amounts, and due to many creditors. The powers of a court of equity to adjust all the equities, audit the debts, and fix the per cent upon the solvent stock necessary to pay the debts, are peculiarly adapted to the exigencies of just such a case: *Dalton etc. R. R. Co. v. McDaniel*, 56 Ga. 191. While as to stockholders who are not in default to the corporation, by reason of no call having been made, but whose subscriptions to the capital stock have not been paid, a court of equity has jurisdiction to compel payment at the instance of an execution creditor of the corporation, a judgment creditor has a complete remedy at law against stockholders in a corporation who are in default after calls regularly made, and will not for this cause alone be allowed to proceed in equity: *Allen v. Montgomery R. R. Co.*, 11 Ala. 437.

It is especially competent for the receiver or assignee in insolvency of a corporation to collect—and it is incumbent on him to do so—all unpaid stock subscriptions, because the assignee or receiver of the corporation succeeds to all its rights, and may recover unpaid subscriptions for the benefit of share-holders and creditors: *Lane v. Nickerson*, 99 Ill. 284; *Sanger v. Hoag*, 17 Wall. 610; *Upton v. Twilcock*, 91 U. S. 45; *Shockley v. Fisher*, 75 Mo. 498; *Donberger v. Broadway etc. Bank*, 10 Mo. App. 490. But a receiver cannot enforce the payment of a subscription which the corporation could not have enforced at the time of his appointment: *Cutting v. Damerei*, 68 N. Y. 410; *Billinge v. Robinson*, 28 Hen, 122; "for the corporation or corporate management just as much as a receiver represents the interests of all persons, creditors as well as share-holders; the main difference being that, as a receiver is ordinarily appointed only when the corporation is insolvent,

the rights of creditors in the corporate funds are then especially prominent, and a receiver is more apt to be regarded as the representative of creditors": Taylor on Private Corporations, sec. 542. "A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken on execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed": *Davis v. Gray*, 16 Wall. 203, 217. A receiver represents, not only the corporation, but also creditors and share-holders, and in his character of trustee for the latter may disaffirm illegal and fraudulent transfers of corporate property, and recover its funds and securities misapplied: *Attorney-General v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272; compare *Ellis v. Little*, 27 Kan. 707. It has been held that, in a suit by a receiver to collect an unpaid subscription, a share-holder may aver that the receiver was improperly appointed by a decree not binding on the share-holder: *Chandler v. Brown*, 77 Ill. 333. But this doctrine may perhaps be of questionable correctness, or at least of questionable application, since the share-holder could have intervened in the proceeding by which the receiver was appointed: *Schoonover v. Hinckley*, 43 Iowa, 82. The president and book-keeper of an insolvent manufacturing corporation can be appointed receivers: *In Matter of Eagle Iron Works*, 3 Edw. Ch. 385. In Wisconsin, it is held that their statute governs the proceedings against the corporation itself, when a sequestration of its property and the appointment of a receiver are sought; and that a receiver appointed under them in an action against the company alone cannot maintain an action against a delinquent stockholder for the unpaid balance due on his subscription: *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57. Creditors, in order to enforce their main right to have the nominal value of the capital stock actually paid in, have the subsidiary right, as shown above, to compel the directors to make calls, or creditors may themselves bring a bill in equity against the delinquent share-holders: *Hightower v. Thornton*, 8 Ga. 486; S. C., 52 Am. Dec. 412, note 427; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437, 449; *Gaff v. Flesher*, 33 Ohio St. 107; *Jones v. Jarman*, 34 Ark. 323; *In Matter of Glen Iron Works*, 16 Phila. 563; *Haslett v. Wotherspoon*, 1 Strob. Eq. 209. But a creditor cannot sustain a bill against share-holders for satisfaction of his claim from their unpaid subscriptions until he has exhausted his legal remedies against the corporation and its property: *Marsh v. Burroughs*, 1 Wood, 463; *Hatch v. Dana*, 101 U. S. 205; *Blake v. Hinkle*, 10 Yerg. 218; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Terry v. Anderson*, 95 U. S. 628; though it would seem that this last rule is inapplicable to creditors of a dissolved corporation who can obtain no judgment at law against it. See last two cases cited. It will be observed, however, that an action at law does not lie by a creditor against a share-holder for unpaid subscriptions: *Patterson v. Lynde*, 106 U. S. 519. In the ordinary case of a solvent corporation, there is no liability on the share-holders to pay in the capital until an assessment is levied by the proper corporate authorities; but when the corporation becomes insolvent, especially if it ceases to be a going concern, this condition precedent ceases to exist, and payment is compellable at the suit of creditors, although no assessment has been made, and no calls for unpaid stock subscriptions have been made by the company: *Hatch v. Dana*, 101 U. S. 214; *Wilbur v. Stockholders of Glen Iron Works*, 18 Nat. Bank. Reg. 178; S. C., 13 Phila. 479; *Holmes v. Sherwood*, 3 McCrary, 406; *Crawford v. Rohrer*, 59 Md. 599; *Seymour v. Sturges*, 26 N. Y. 134. "After all, a company call is

but a step in the process of collection, and a court of equity may pursue its own mode of collection, so that no injustice is done to the debtor": *Hatch v. Dana*, 101 U. S. 215; *Crawford v. Rohrer*, 59 Md. 599. But compare *Bunn's Appeal*, 14 Weekly Notes Cas. 193, 200, showing that a stockholder, even of an insolvent corporation, is not liable on his unpaid subscriptions, unless an assessment has been made. As unpaid stock subscriptions constitute a trust fund for the benefit of all the general creditors of the corporation, — *Sawyer v. Hoag*, 17 Wall. 610; *Shockley v. Fisher*, 75 Mo. 498; *Crawford v. Rohrer*, 59 Md. 599; *Holmes v. Sherwood*, 3 McCrary, 405, — a creditor suing for satisfaction of his debt may, and, according to the majority of decisions, must, sue on behalf of himself and all other creditors who are willing to join. It has been held, therefore, that a judgment creditor of an insolvent corporation may obtain satisfaction of his claim by an ordinary creditor's bill, and that the proceedings in such a case may be carried on like a creditor's bill upon a judgment obtained against an individual. Other creditors may come in as parties; but if they do not come in voluntarily, a distribution will be made without regard to their claims: *Bartlett v. Drew*, 57 N. Y. 587; *Marsh v. Burroughs*, 1 Wood, 463; *Hatch v. Dana*, 101 U. S. 205; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Henry v. Vermillion etc. R. R. Co.*, 17 Ohio, 187. And in a suit to enforce unpaid stock subscriptions, it is proper to join all the share-holders as defendants; and if the latter are too numerous to be joined, or if some of them are unknown to the plaintiff, or insolvent, or beyond the jurisdiction of the court, the creditor's bill should contain allegations to this effect: *Holmes v. Sherwood*, 3 McCrary, 405; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57; *Vick v. Lane*, 56 Miss. 681; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Bronson v. Wilmington Ins. Co.*, 85 N. C. 411; compare *Erickson v. Nesmith*, 46 N. H. 371; *Hadley v. Russell*, 40 Id. 109. The corporation should also be made a party defendant: *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Holmes v. Sherwood*, 3 McCrary, 405; *Vick v. Lane*, 56 Miss. 681. All of the solvent stockholders of the insolvent corporation must be joined as defendants in such a suit, unless it is impracticable, on account of being too numerous, etc.: *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57; *Vick v. Lane*, 56 Miss. 681. In such a case one may sue or be sued for all the others: *Bronson v. Wilmington Ins. Co.*, 85 N. C. 411. The corporation being insolvent, no doubt any creditor not made a party to the bill has a right to come in and insist on a ratable distribution of the corporate assets, which include unpaid subscriptions: *Pfohl v. Simpson*, 74 N. Y. 137; *Marr v. Bank of West Tennessee*, 4 Cold. 471; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57; *Osgood v. Laytin*, 3 Keyes, 521. And a creditor's bill that is properly framed will be in a form to enable any creditor to join. Such was the form in *Hatch v. Dana*, 101 U. S. 205; *Ogilvie v. Knox Ins. Co.*, 22 How. 380.

It would, however, work hardship, if a creditor, who sues in a court of equity, to reach assets of the corporation which he cannot subject to his claim in an action at law, were in all cases obliged to make all the share-holders parties, or even to bring his suit on behalf of all the creditors. To insist on this would practically force a creditor seeking such equitable relief to bring a bill for the winding up of the corporation, which is certainly not incumbent on him: *Crawford v. Rohrer*, 59 Md. 599; *Marsh v. Burroughs*, 1 Wood, 463, 468; *Bartlett v. Drew*, 57 N. Y. 587; *Hatch v. Dana*, 101 U. S. 205, 214; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Pierce v. Milwaukee Construction Co.*, 34 Wis. 253. Instead of himself suing, a creditor may, as shown above, apply for the appointment of a receiver, whose function it will be to collect unpaid

subscriptions. After the appointment of a receiver, a creditor cannot bring suit in his own name for unpaid subscriptions; nor prosecute a suit further, if he has already begun one: *Rankine v. Elliott*, 16 N. Y. 377. A receiver should not call on share-holders for the balance of their unpaid subscriptions, in order to pay creditors, until the whole amount of the corporate indebtedness is determined, and the liability of each share-holder fixed: *Chandler v. Keith*, 42 Iowa, 99; *Mann v. Penn*, 3 N. Y. 415; but compare *Dayton v. Borst*, 31 Id. 435. In a creditor's action against an insolvent corporation for the appointment of a receiver, a court has no jurisdiction to grant an interlocutory order making an assessment on the unpaid stock, as against share-holders not parties to the bill, the bill containing no allegation that they are too numerous to be made parties: *Lamar v. Hildreth*, 55 Iowa, 248. Unpaid subscriptions, being part of the assets of the corporation, pass by a decree in bankruptcy to its assignee; after which, he, and not the creditors, should sue for them: *Lane v. Nickerson*, 99 Ill. 284; *Sanger v. Upton*, 91 U. S. 56, 60; *Gilmore v. Bank of Cincinnati*, 8 Ohio, 71; *Shockley v. Fisher*, 75 Mo. 498; and the mere fact that the assignee has delayed for two years in bringing suit does not enable creditors to sue: *Lane v. Nickerson*, 99 Ill. 284. But a bill brought by creditors, alleging collusion between the corporation, its assignee, and its debtors, may be sustained: *Stocks v. Van Leonard*, 8 Ga. 511. Unpaid subscriptions to the stock of a corporation will also pass to the assignee under a general assignment for the benefit of creditors: *Lionberger v. Broadway Savings Bank*, 10 Mo. App. 499; *Shockley v. Fisher*, 75 Mo. 498; and a bill in equity will lie in favor of the assignee to recover such unpaid subscriptions: *Lionberger v. Broadway Savings Bank*, 10 Mo. App. 499. If one of two persons to whom an assignment is made for the benefit of creditors refuses to qualify, all the powers of the trust vest in the other, and he may proceed alone to collect the assets: *Shockley v. Fisher*, 75 Mo. 498. Unpaid balances upon stock subscriptions are corporate assets, and are assignable; and if such an unpaid balance be properly assigned, it passes to the assignee, and he may collect it: *Id.*

The statute of limitations does not run against the right of creditors to enforce the payment of unpaid stock subscriptions, until the corporation has ceased to be a going concern, or at least until a call is made: *Curry v. Woodward*, 53 Ala. 371; *Payne v. Bullard*, 23 Miss. 88; *Alibone v. Hager*, 46 Pa. St. 48, 54. And as against creditors suing for unpaid subscriptions, a share-holder cannot deny the corporate existence, even when a judgment of ouster has been rendered: *Rowland v. Meader Furniture Co.*, 38 Ohio St. 269; numerous cases in note to *Parker v. Thomas*, 81 Am. Dec. 401. And it is no defense to a suit on a subscription to its stock, brought by a railroad company, that the governor of the state had seized the road: *Mullins v. North and South R. R. Co.*, 54 Ga. 580. When, after the insolvency of the corporation, suit is brought by or on behalf of creditors against share-holders, either on their statutory liability or for unpaid subscriptions, the latter cannot successfully plead that they were induced to subscribe by fraudulent misrepresentations on the part of the corporation or its officers or agents: See extended note to *Parker v. Thomas*, 81 Am. Dec. 401; *Ogilvie v. Knox Ins. Co.*, 22 How. 390; S. C., 2 Black, 539; *Upton v. Tribilcock*, 91 U. S. 45; *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248; *Upton v. Englehart*, 3 Dill. 496; *Turner v. Grangers' etc. Ins. Co.*, 65 Ga. 649; compare *Weber v. Fickey*, 52 Md. 500. When shares are not fully paid up and the corporation is in failing circumstances, it is the general rule throughout the United States that the holder cannot validly transfer them to an irresponsible person, for the purpose of avoiding further liability

in regard to them. The right of transfer cannot be exercised in defraud of creditors of the corporation. A similar rule applies to transfers of shares in the stock of a corporation whose share-holders are by statute rendered personally liable to creditors. The English cases, on the other hand, hold that a share-holder may transfer his shares to an irresponsible person for the sole purpose of freeing himself from further liability upon them. These propositions are supported by numerous cases cited in that excellent and concise work, *Taylor on Private Corporations*, sec. 749. As to winding up affairs of insolvent corporations, see *Treadwell v. Salisbury Mfg. Co.*, 86 Am. Dec. 490, note 501; *Neall v. Hill*, 76 Id. 508; note to *Cortleyou v. Hathaway*, 64 Id. 485, 486, on appointment of receivers; *Morgan v. New York R. R. Co.*, 40 Id. 244.

PALMER v. HARRIS.

[60 PENNSYLVANIA STATE, 156.]

EQUITY WILL RESTRAIN BY INJUNCTION the counterfeiting of trade-marks, for the purpose of promoting honesty and fair dealing, and because no one has the right to sell his own goods as the goods of another.

PARTY IS NOT ENTITLED TO INJUNCTION to secure the profits arising from the fraudulent use of a trade-mark bearing on its face a falsehood as to the place where the goods are manufactured, and where, in order to have the benefit of the reputation which such goods have acquired in the market, he is guilty of the same fraud which he complains of in defendant.

WHEN SLANDER IS IN FOREIGN LANGUAGE, it is necessary in an action for damage to prove that the hearers understood the language. This rule does not apply to a libel in a foreign language.

FOR EQUITY TO REFUSE TO ENJOIN the counterfeiting of a fraudulent trade-mark, it is not necessary that any person has been actually deceived or defrauded; it is enough that it is a misrepresentation calculated to have that effect on the unwary and unsuspecting.

THE opinion states the facts.

Parsons and Bullitt, for the appellant.

T. Cuyler, for the appellee.

By Court, **SHARSWOOD, J.** The plaintiff, according to the statements of his bill, is the manufacturer of a cigar known as the "Golden Crown," and he has devised a trade-mark, which he uses in its sale. He charges that the defendant, who is a printer by trade, has counterfeited this mark, and sells copies of it to persons engaged in the manufacture and sale of cigars, by whom they are used to his damage. The answer of the defendant admits these allegations; but sets up as a ground for the non-interference of the court that the articles thus sold by the plaintiff were manufactured in the city of New York, and that the trade-mark in question con-

tains upon it the declaration that they are the product of a "factory of cigars from the best plantations de la Vuelta Abajo, Calle del Agua, Habana." The case having been heard on bill and answer, the bill was dismissed, with costs.

The maxim which is generally expressed, "He who comes into equity must come with clean hands" (Snell's Principles, 33), but sometimes in stronger language, "He that hath committed iniquity shall not have equity" (Francis's Maxims, 5), has been often applied to bills to restrain by injunction the counterfeiting of trade-marks. The ground on which the jurisdiction of equity in such cases is rested is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another: *Croft v. Day*, 7 Beav. 84. "It is perfectly manifest," said Lord Langdale, "that to do this is a fraud, and a very gross fraud." It is plain that there is no class of cases to which the maxim referred to can be more properly applied. The party who attempts to deceive the public by the use of a trade-mark which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the defendant. He certainly can have no claim to the extraordinary interposition of a tribunal constituted to administer equity for the purpose of securing to him the profits arising from his fraudulent act. Thus in *Pidding v. How*, 8 Sim. 477, the plaintiff had made a new sort of mixed tea, and sold it under the name of "Howqua's Mixture"; but as he had made false statements as to the teas of which his mixture was composed, and as to the mode in which they were procured, the court refused an injunction, Vice-chancellor Shadwell remarking: "It is a clear rule laid down by courts of equity not to extend their protection to a person whose case is not founded in truth." In *Flavel v. Harrison*, 10 Hare, 467, an injunction was refused, where an article was sold by the name of "Flavel's Patent Kitchener," for which there never had been a patent. In *Leather Cloth Company v. American Leather Cloth Company*, 11 H. L. Cas. 533, though decided on the ground that the mark used by the defendants was substantially different from that of the plaintiffs, yet it may be fairly inferred, from all the opinions, that, if necessary, the decree of Lord Chancellor Westbury would have been affirmed on the broader ground. Thus a company which had gained reputation by a particular

manufacture, on discontinuing their business transferred their stamp or trade-mark, which indicated them as the manufacturers, to other parties; and it was the opinion expressed that such assignees would not be protected in equity in the use of that mark on goods manufactured by themselves. "So," said Lord Cranworth, "in the cases of bottles or casks of wine stamped as being the growth of a celebrated vineyard, or cheese marked as the produce of a famous dairy, or of hops stamped as coming from a well-known hop-garden in Kent or Surrey, no protection would be given to the sellers of such goods, if they were not really the produce of the place from which they purported to come." It is contended, however, that this case is different, because there were marks or words used with these labels inconsistent with the idea that they were held forth as manufactured in Havana. On the label is printed, "Entered according to act of Congress, A. D. 1858, by Lorin Palmer, in the clerk's office of the southern district of New York." Apart from the fact that this is in such very small type, and so abbreviated that it would probably escape the observation of every one whose attention was not specially directed to it,—a circumstance which rather strengthens the evidence of an intention to mislead the public,—what is there in the fact that the design or engraving had been copyrighted in the United States inconsistent with the declaration that the cigars contained in the box were manufactured in Havana of Cuban tobacco?

But, again, it is said that the United States internal revenue stamp would at once undeceive the purchaser, there being a difference between the stamp used for articles imported and for those of domestic manufacture. Few persons would stop to notice this difference; and besides, as it is alleged, the trade-mark is pasted on the inside of the lid, and when the box is open for the purpose of retailing, the trade-mark is brought directly in the view of persons wishing to purchase, and the revenue stamp is not seen unless the lid is turned down, and the box examined on the outside. It is contended, further, that the falsehood is in a foreign language, of which it is to be presumed that the plaintiff's customers are ignorant. Yet there is certainly enough to convey to every one who can read that the cigars are from Havana. It is true that when a slander is uttered in a foreign tongue it is necessary, in an action for damage, to prove that the hearers understood the language; for it will not be presumed that, being ignorant of

the meaning of the words, they afterwards repeated them to those who understood them: 2 Starkie on Slander, 52; but there is no such rule in an action for a libel in a foreign language, for *littera scripta manet*; that may be read and explained by those who do to those who do not understand it. The case of a written or printed libel has a much closer analogy to the point before us than that of spoken slander. But above all this, it is not necessary that any one person has been actually deceived or defrauded; it is enough that it is a misrepresentation calculated to have that effect on the unwary and unsuspecting.

Decree affirmed, and appeal dismissed at the costs of the appellant.

INJUNCTION IS PROPER REMEDY to prevent counterfeiting or infringement of trade-mark: *Bradley v. Norton*, 87 Am. Dec. 200, and note 204.

COMPLAINT, IN SLANDER SPOKEN IN FOREIGN LANGUAGE, must aver that the words as spoken were understood by those who heard them: *K— v. H—*, 91 Am. Dec. 397.

SHINN v. BODINE.

[60 PENNSYLVANIA STATE, 122.]

ENTIRETY OF CONTRACT DEPENDS upon the intention of the parties, and not on the divisibility of the subject. Nor will the mode of measuring the price change the effect of the contract when it is entire.

CONTRACT TO DELIVER CERTAIN AMOUNT OF COAL, at a stated price per ton, the coal to be delivered on board vessels sent for it during certain months, and if not so delivered, a certain amount of the coal to be delivered later, is an entire contract, and payment cannot be demanded on delivery of each vessel-load, nor the contract rescinded for refusal to pay in such mode before the contract is entirely fulfilled.

THE opinion states the facts.

McMurtrie, for the plaintiff in error.

Perkins and Perkins, for the defendants in error.

By Court, AGNEW, J. The entirety of a contract depends upon the intention of the parties, and not on the divisibility of the subject. The severable nature of the latter may often assist in determining the intention, but will not overcome the intent to make an entire contract, when that is shown. Nor will the mode of measuring the price, as by the bushel, ton, or pound, change the effect of the agreement when it is entire. If a party should agree to deliver one bullock, at a certain price per pound, and on a certain day, no one would doubt the

entirety of the contract, notwithstanding the mode of measuring the price. But the indivisibility of the contract would not be less if he had contracted in the same terms to deliver two. Precisely the same rule would apply to an agreement to deliver one hundred bushels of wheat by a certain day, for a certain price per bushel, and the entirety of the contract would not be disproved if the agreement required it to be delivered by the wagon-load. Just so here; the contract for the delivery of eight hundred tons of coal, at a stated price per ton, is in language clearly denoting an entire contract for that much coal, the price measured by the ton not indicating any intent to sever in payment. Nor does the provision for delivery on board vessels, sent for the coal during August and September, indicate an intent to sever the payment, for delivery by the vessel-load was a necessity growing out of the quantity to be delivered and the distance of transportation. And the last clause was but a provision against inability to send for all the coal in the prescribed time, and fails to indicate any intent to sever the payment. No part of the agreement disclosing an intent to sever in the payment, the legal presumption drawn from the entire contract to deliver eight hundred tons of coal remains,—that it was to be paid for on delivery.

On authority, the case is not less clear: *Shaw v. Badger*, 12 Serg. & R. 275; *Shaw v. Turnpike Co.*, 2 Pa. 454; *Harris v. Ligget*, 1 Wils. & S. 301; *Davis v. Maxwell*, 12 Met. 286. The authorities cited by the plaintiff in error are all distinguishable. *Lester v. McDowell*, 18 Pa. St. 92, was a question in replevin of title dependent on delivery. The same question arose in *Welsh v. Bull*, 32 Id. 13, the action there being trespass. In *Reybold v. Voorhees*, 30 Id. 116, the contract clearly indicated a severance in the payments. *Mayor v. Pyne*, 2 Car. & P. 91, was put on the ground of the refusal of the purchaser to take the undelivered numbers of the work subscribed for. The idea thrown out by Best, C. J., that though the contract was entire for the whole work in numbers, yet there was a subordinate contract to pay for each number on delivery, is plainly founded on what he understood to be a custom of the trade. The contract in *Withers v. Reynolds*, 2 Barn. & Adol. 882, was for no specific quantity of straw, but a running agreement for the delivery of wheat straw for the use of the stables until a certain day, at a specified price per load, with an agreement to pay the price for each load. The intention to sever the payment was clear. The other English cases cited

need no notice, more than to say they are clearly distinguishable from this. We are of opinion that the contract here for the delivery of eight hundred tons of coal was entire, and payment of the price waited on the fulfillment. It was therefore not in the power of the defendants below to demand payment on each vessel-load, and to rescind on a refusal to pay in this mode.

Judgment affirmed.

WHEN CONTRACT IS ENTIRE, PERFORMANCE is a condition precedent to recovery of any part: *Winstead v. Reid*, 57 Am. Dec. 571, and note 572; *Mildridge v. Rowe*, 43 Id. 41; *Dula v. Cowles*, 75 Id. 463, and note 467.

HOOPE'S APPEAL.

[80 PENNSYLVANIA STATE, 220.]

WORDS OF WILL, IN THEIR ORDINARY LEGAL SIGNIFICATION, must be taken to express the intention of the testator, unless there is something in the will, or circumstances *dehors* it, to indicate that they were used in a different sense, and all the circumstances may be resorted to to assist the construction.

HOUSEHOLD FURNITURE COMPRISES EVERYTHING that contributes to the convenience of the householder or ornament of the house.

BEQUEST IN WILL BY BOARDING-SCHOOL KEEPER of household furniture will pass all such articles as are employed for the comfort or convenience of the boarders, as well as those used by members of the testator's family, or by guests entertained without pay.

SCHOOL-ROOM FURNITURE WILL NOT PASS IN WILL of a boarding-school keeper as household furniture, though the testator may have lived in one of the rooms in the house used for school purposes.

ARTICLES OF TRADE IN STORE OR SHOP of cabinet-maker, upholsterer, or other tradesman, will not pass in his will as household furniture, though he may have lived in the same building, and the same rule applies to a hotel-keeper living in a different house.

THE opinion contains the facts.

G. Junkin, for the appellants.

Smith, and Meredith and Smith, for the appellee.

By Court, SHARSWOOD, J. The words of a will, in their ordinary legal signification, must be taken to express the intention of the testator, unless there be something either in the will, or circumstances *dehors* the will, to indicate that they were used in a different sense. That the circumstances of the property and the testator with reference to it may be resorted to to assist the construction, is a principle perfectly well settled:

1 Jarman on Wills, 363. What, then, is the meaning of the words "household furniture"? In that excellent old work, "A Treatise of Equity" (of which Henry Ballow is the reputed author, and which is the text of Fonblanque, so that, with the elaborate notes which have been added by later editors, it has at length become, as has been well remarked, "a rivulet of text meandering through a wilderness of notes"), it is said that "household stuff is *instrumentum patrisfamilias domesticum et quotidianum*": Book 4, c. 1, sec. 11, p. 103. It proceeds to enumerate "tables, stools, chairs, carpets, hangings, beds, bedding, basins with ewers, candlesticks, all sorts of vessels serving for meat and drink, being of earth, wood, glass, brass or pewter, pots, pans, spits, and such like." It comprises, as has been said in several cases, everything that contributes to the convenience of the householder or ornament of the house: *Kelly v. Powley*, Amb. 610; *Cole v. Fitzgerald*, 1 Sim. & S. 189; *Carnagy v. Woodcock*, 2 Munf. 239. It is contended, however, that the circumstances in this case show that the testatrix used these words in a more restricted sense. These circumstances are, that the testatrix kept a boarding-school; that the greater part of the furniture in question was for the use of the boarders; that they form a very large proportion of her whole fortune, and that a part only of the house in which she lived was furnished for her own use and comfort. Hence it is argued that the bequest should be confined to the articles so used by her. I agree that the furniture of the school-room is not household furniture; desks, stools, slates, inkstands, maps, globes, etc., cannot be brought within that category. The fact that the testatrix occupied one of the rooms of the house in which she resided for the purpose of a school would make no difference. But as to the remaining articles, it is not easy to see how those employed for the comfort and convenience of boarders can be distinguished from such as are for the use of the members of the family, or of guests entertained without pay. It cannot be pretended that these would not be included; otherwise, the words would be narrowed down by construction to articles used personally by the testatrix herself; and for this there is neither reason nor authority. It certainly cannot be affected by the size of the establishment. A poor widow ekes out her livelihood in a small house by taking two or three boarders; would not the furniture of her parlor and kitchen, as well as of her guest-chambers pass by a bequest of her household stuff? If so, can it make

any difference that there are fifty or one hundred boarders? Where is the line to be drawn? No doubt if a cabinet-maker or upholsterer, or other tradesmen, were to make a will in those words, articles in his store or shop answering to the description would not pass, though he might have his residence in the same building. They would be in the way of his trade. So if the keeper of a hotel lived in a different house, the words would admit of a different construction. This is the extent to which the authorities relied on by the appellant go. We concur, therefore, in the conclusion at which the court below arrived.

Decree affirmed, and appeal dismissed, at the costs of the appellant.

CONSTRUCTION OF WILL — INTENT OF TESTATOR, AS GATHERED FROM WHOLE INSTRUMENT, MUST CONTROL: *Brattle Square Church v. Grant*, 63 Am. Dec. 725; *German v. German*, 67 Id. 451, and note 454; *Bell County v. Alexander*, 73 Id. 268, and note 276. And evidence is admissible to explain an ambiguity appearing on the face of the will or dehors it: *Bathery v. Bathery*, 78 Id. 499, and note 505, 506.

BUCKLEY v. GARRETT.

[60 PENNSYLVANIA STATE, 333.]

IF DEBTOR, AT OR IMMEDIATELY AFTER EXECUTION OR ASSIGNMENT of a mortgage on his property to a creditor, transfers to him a policy of insurance against fire on the mortgaged premises, though nothing be expressed at the time, or it is transferred as collateral security generally, it is a conclusion of law that the policy is to be held by the creditor as collateral security for the mortgage, and it requires an express agreement to authorize the assignee to apply the insurance money, in case of loss, to any other debt or liability; and so the jury should be instructed.

THE opinion states the facts.

Arundel and Brinton, for the plaintiffs in error.

Smith and Darlington, and Smith, for the defendants in error.

By Court, SHARSWOOD, J. If a debtor, at or immediately after the execution or the assignment of a mortgage on his property to a creditor, transfers to him a policy of insurance against fire on the mortgaged premises, though nothing be expressed at the time, or it be transferred as collateral security generally, it is a conclusion of law, from the very nature

of the transaction; that the policy is to be held by the creditor as a collateral security for the mortgage. It would require evidence of an express agreement or understanding to authorize the assignee to apply the amount of the insurance received in the event of a loss to any other debt or liability. The policy, being on the mortgaged premises, was to make good the value of the property to the holder of the mortgage, if the buildings or improvements should be destroyed by fire. The transaction speaks for itself as loudly as any words could make it. So this court decided when the case was here before: *Buckley v. Garrett*, 47 Pa. St. 280. "The bond of Buckley," says Mr. Justice Read, "was given to Garrett and Martin on the 28th of March, accompanied by his wife's mortgage, as a collateral security for an undivided third part of a mortgage to be assigned to them. By his bond, Buckley became a debtor to Garrett and Martin, and also, on the same day, made his wife his creditor. When, therefore, on the 31st of March, he assigned this policy as collateral security, it was as collateral to his own bond, given three days before, and to secure his wife, who had become his creditor; and if it had been thus submitted to the jury, their verdict must have been for the defendants"; that is, if the case had been submitted to the jury with this instruction from the court, their verdict must have been for the defendants. Any other verdict would have been against the charge as to the law, and could not have been permitted to stand.

The learned judge below, therefore, misapprehended the former decision in the case when he supposed that the question was one of fact, to be left as such to the jury. It arose wholly upon the construction of writings, as he had properly apprehended it to do upon the first trial before him, and was therefore wholly in the province of the court. Instead of instructing the jury that the assignment of the policy to the assignee of the mortgage was a collateral security for that mortgage alone, in the event of loss by fire to the mortgaged premises, and which, of course, inured to the benefit of the assignor's own bond and his wife's mortgage, also given as collateral for the same debt, he said in his charge: "If it was transferred by Mr. Buckley especially to secure the debt of one thousand dollars, with a view to protect his wife against loss as his surety, then the money received from the company should have been applied to this debt." If this had been a correct statement of the law, he ought to have added that, as

there was no evidence in the case that it was, in fact, so specially assigned, their verdict must be for the plaintiffs. It is evident, if the law has been correctly held by this court, that the case called for a binding direction to the jury in favor of the defendants.

Nor do we think that the letter of Mrs. Buckley to Mr. P. F. Smith, or the conversation with Mr. Buckley, detailed by that gentleman, had any tendency to show that there was an agreement in regard to the assignment different from what the law implied. Had the defense now set up been that Mr. or Mrs. Buckley had paid the money, this request for time, when called on to pay the mortgage, would have been cogent evidence to throw discredit on such a defense. But when the question was what appropriation the law would make of the proceeds of collaterals collected by the creditor, the evidence only showed that they were ignorant of their legal rights, and could not be tortured into an admission that they had made any special agreement on the subject when the policy was assigned.

Judgment reversed, and *venire facias de novo* awarded.

THIS PRINCIPAL CASE IS CITED with approval in *James's Appeal*, 89 Pa. St. 55.

STOVER v. JACK.

[60 PENNSYLVANIA STATE, 389.]

WHAT CONSTITUTES LOW-WATER MARK of navigable streams in Pennsylvania must be determined by the law of that state, and not by the law of England or sister states.

AT COMMON LAW, ONLY THOSE STREAMS are navigable in which the tide ebbs and flows; as to them, low or high water mark is decided by the ebb and flow of the tide. But the common law being inapplicable in Pennsylvania, it has not been adopted.

IN PENNSYLVANIA, STATE HAS NOT PARTED with the control of the waters of its navigable streams, nor of the soil beneath.

IN PENNSYLVANIA, GRANTS BY STATE of lands calling for a navigable stream as a boundary do not extend beyond low-water mark, and the grant is not absolute except to high-water mark.

IN PENNSYLVANIA, GRANTS BY STATE of land bounded by a navigable stream gives the grantee only a qualified title to the space between high and low water mark. The right of passage over it in high water remains in the public. The state may use it for navigation purposes without compensation, and may protect it from an unauthorized use, even by the owner of the land, to low-water mark.

ISLANDS IN NAVIGABLE STREAMS in Pennsylvania belong to the state, and are excepted from the general laws for the sale and settlement of vacant lands. They are granted under special laws.

RIPARIAN PROPRIETORS IN PENNSYLVANIA take to ordinary low-water mark unaffected by drought.

ISLAND CUT OFF FROM MAINLAND BY NAVIGABLE STREAM in ordinary stages of low water cannot be added to the land of an adjacent owner merely because in very dry season the river almost disappears, and no water flows over the intervening dry, sandy, or pebbly bed.

THE opinion states the facts.

Baugh and Darlington, for the plaintiffs in error.

A. Wanger, for the defendant in error.

By Court, AGNEW, J. The deed is not before us, but it seems the title of the plaintiff extended to low-water mark, and on this ground he claimed the ownership of the *locus in quo* of the alleged trespass. The defendant alleged it to be an island surrounded by water, except at very low stages. The court held that low water, as contradistinguished from high water, does not mean the lowest water the stream may exhibit under special and extraordinary circumstances; and that the *locus in quo* is an island if the water of the river flows around it at its ordinary stage unaffected by floods or drought. This is assigned for error, and it brings up for decision what is meant by low-water mark as a terminus or boundary. I have found no case defining low-water mark, though many refer to it as fixing boundary of the title on navigable streams. Its definition, however, seems to grow out of the principles recognized as establishing the character of these streams, and the rights of riparian owners. The question is one to be decided by the law of this state, and not by that of Great Britain, or even some of the sister states. At the common law, those streams only are considered navigable in which the tide ebbs and flows. High or low water mark was therefore easily determined, the ocean maintaining a common level, and the ordinary flow and ebb of tide being regular in their extent, and marking the limits of high and low water with great uniformity. But in this state its large navigable streams rise and flow hundreds of miles above tide, and are affected by floods and droughts to extremes that surprise the unaccustomed eye, sometimes filling the valleys far beyond the banks of the stream, and at others shrinking within the pebbly bed until a thin thread only marks the flow. The common law, being inapplicable to the circumstances, has therefore not been adopted. For this

reason neither the control of the waters of navigable rivers, nor of the soil beneath, has been parted with by the commonwealth; and the far-seeing wisdom of our ancestors has been, in this respect, amply vindicated by the results. This was soon perceived when the state began to improve the navigation of her rivers by artificial means. Had it been otherwise, many noble works designed to enrich and benefit her citizens must have failed in an encounter with private interests. The importance of the rights thus reserved will be seen in the following cases,—others might be added: *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & R. 79; *Commonwealth v. Fisher*, 1 Pa. 462; *Zimmerman v. Union Canal Co.*, 1 Watts & S. 346; *McKeen v. Del. Div. Canal Co.*, 49 Pa. St. 424.

Owing to this right of control and title to the soil itself, it has always been held that the grants of the state of lands bordering on navigable streams, even when calling for the river as a boundary, do not extend beyond low-water mark: *Hart v. Hill*, 1 Whart. 137; *Ball v. Slack*, 2 Id. 508; *Lehigh Valley R. R. Co. v. Trone*, 28 Pa. St. 206; *Jones v. Janney*, 8 Watts & S. 436. And even to this extent the grant of title is not absolute, except to high-water mark. As to the intervening space between high and low water mark, the title of the private owner is qualified. The right of passage over it in high water remains in the public. The state may use it for purposes connected with the navigation of the stream without compensation, and may protect it also from an unauthorized use of it, even by the owner of the land, to low-water mark: *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & R. 79; *Commonwealth v. Fisher*, 1 Pa. 462; *Zimmerman v. Union Canal Co.*, 1 Watts & S. 346; *Bailey v. Millenberger*, 31 Pa. St. 43; *Flanagan v. City of Philadelphia*, 42 Id. 219. Another consequence of the Pennsylvania doctrine as to navigable streams is, that the islands in them belong to the state, and have always been considered as excepted from the general laws for the sale and settlement of the vacant lands of the commonwealth. They have always been granted under laws of special application to islands. It is also a well-known fact that in the seasons of extreme low water many of the islands of the principal rivers are not entirely surrounded with water, but may be reached from the shore dryshod. All these considerations show that, to adopt any other rule than ordinary low-water mark, unaffected by drought, as the limit of title, would carry the rights of riparian owners far beyond bound-

daries consistent with the interests and policy of the state, and would confer title where heretofore none has been supposed to exist. No one has ever thought that an island cut off from the mainland by the stream in ordinary stages of low water could be added to the land of an adjacent proprietor merely because in the very dry season of the year the stream had almost disappeared, and no water flowed over the intervening dry and sandy or pebbly bed. The doctrine that low-water mark is the extremest verge to which a long drought may reduce the stream would lead to such results. Ordinary high water and ordinary low water each has its reasonably well-defined marks, so nearly certain that there is not much difficulty in ascertaining it. The ordinary rise and fall of the stream usually finds nearly the same limits. But to bound title by a mark which is set by an extraordinary flood, or an extreme drought, would do injustice, and contravene the common understanding of the people. We are of opinion, therefore, that the plaintiff's title was bounded by ordinary low-water mark, where that was properly submitted to the jury.

Judgment affirmed.

AT COMMON LAW, RIVERS WERE NOT NAVIGABLE, except where the tide ebbed and flowed: *Monongahela Bridge Co. v. Kirk*, 84 Am. Dec. 527, and note 540.

SOIL IN BED OF RIVER up to low-water mark is the property of the state: *Monongahela etc. Co. v. Kirk*, 84 Am. Dec. 527, and note 540.

RIPARIAN OWNER, WHETHER TAKES ABSOLUTE TITLE to low-water mark. *Emminger v. People*, 95 Am. Dec. 495, and note 501; *Berry v. Snyder*, 96 Id. 219, and note 239.

ISLAND IN NAVIGABLE STREAM, TITLE TO: *McCullough v. Wall*, 53 Am. Dec. 715, and note 727; note to *Hagan v. Campbell*, 33 Id. 281.

ORDINARY HIGH-WATER MARK is boundary of absolute title; ordinary low-water mark, that of the qualified right: *Hartley v. Crawford*, 81° Pa. St. 486, citing the principal case.

TITLE OF RIPARIAN OWNER DOES NOT EXTEND beyond ordinary low-water line; between that and ordinary high-water line, the ownership is subject to the right of navigation: *Poor v. McChure*, 77 Pa. St. 219, citing the principal case.

DELAWARE DIVISION CANAL CO. v. COMMONWEALTH.

[60 PENNSYLVANIA STATE, 367.]

CORPORATIONS OTHER THAN MUNICIPAL MAY BE INDICTED, and are amenable to the criminal law for the creation and maintenance of a public nuisance; but for other misfeasances they are not generally indictable.

CORPORATIONS ARE NOT ANSWERABLE FOR ASSAULTS and batteries, riots, larcenies, and the like.

ARRESTS OF JUDGMENT ARISE from intrinsic causes appearing on the face of the record, and in criminal cases are founded on exceptions to the indictment. An exception to this rule exists when pardon is pleaded before sentence.

IN CIVIL ACTIONS, WHATEVER IS ALLEGED in arrest of judgment must be such matter as would on demurrer be sufficient to overturn the action or plea, and the same rule applies in both civil and criminal cases.

CORPORATION MAY BE INDICTED FOR NUISANCE in maintaining, continuing, and keeping up a tow-path in so careless, unskillful, and unlawful manner, that the water from their canal escaped through the locks or walls, and formed pools or ponds of stagnant water, producing miasma, and corrupting and rendering the air unwholesome, to the nuisance and injury of the public, and producing disease among them.

WHEN CORPORATION IS INDICTED FOR NUISANCE, the indictment need only set forth the facts constituting the offense.

STATE CAN NEITHER BE SUED NOR BE INDICTED; but such immunity does not pass to the vendees of her property or rights.

WHERE CORPORATION IS CONVICTED OF PUBLIC NUISANCE, and required to abate it, the fact that such nuisance is on the land of a stranger is no reason that it should not be abated. He cannot be allowed to control the public right to have it abated.

INDICTMENT AGAINST CORPORATION FOR NUISANCE, averring that the latter is situated in a certain borough, is a sufficient averment of being in the neighborhood of dwellings, especially after verdict, without objection before trial.

THE opinion states the facts.

Lear, for the plaintiffs in error.

H. P. and G. Ross, James, and Cope, for the commonwealth.

By Court, THOMPSON, C. J. No doubt whatever can exist at this day but that corporations other than municipal may become amenable to the criminal law in the matter of the creation and maintenance of things which amount to or become public nuisances, and to be proceeded against by indictment: 1 Am. Crim. Law, secs. 86, 87. As a general rule they are not indictable for misfeasances, unless indeed they assume the shape of nuisances: *Id.*, sec. 89. For assaults and batteries, riots, larcenies, and the like, they are not so answerable. These principles, however, do not seem to be disputed in this case.

The first and second assignments of error present a single

question, namely, that the court below erred in not arresting judgment on the verdict against the defendant.

Arrests of judgment arise from intrinsic causes appearing on the face of the record: 3 Chitty's Bla. Com. 395. In criminal cases, an arrest of judgment is founded on exceptions to the indictment: 4 Id. 375. This is the general rule, although an exception exists where a pardon is pleaded before sentence. The rule in civil cases seems well settled and elementary "that whatever is alleged in arrest of judgment must be such matter as would, on demurrer, have been sufficient to overturn the action or plea": 3 Id. 394. I apprehend there is no difference between criminal and civil cases in the applicability of the rule. Tested by this rule, wherein was there error on part of the court in refusing to arrest the judgment in this case?

We find, on examination of the indictment, that it is in due and proper form, charging the defendants with maintaining, continuing, and keeping up the tow-path in so careless, unskillful, and unlawful manner, that the water from their canal escapes through the lock or walls, and forms pools or ponds of stagnant water, producing miasma or miasmatic vapors, corrupting and rendering the air unwholesome, to the nuisance and injury of the public, and producing disease among the inhabitants of the neighborhood. The second count charges the defendants with unlawfully and injuriously keeping and maintaining the pools or ponds, formed as stated in the first count, outside of and unnecessary to the use and business of the canal, without drains or other means to carry off the water whereby they became and are stagnant water, creating miasma and producing disease among the people resident there.

Tested by this standard of whether demurrable, the indictment is sound beyond a doubt, if the creation and maintenance of a nuisance be a misdemeanor. That it is, no possible doubt can exist. The indictment being sound, and exhibiting on its face a clearly defined offense, what reason could there be for arresting judgment? The answer must inevitably be, none; and here we might leave the subject of the exceptions, but will notice some matters claimed in argument, but which, after all, cannot affect the positions stated, so far as the result is concerned.

The defendants claim that they ought not to be convicted and sentenced because they held the works mediately by purchase and lease from the commonwealth. This is true. But

it nowhere appears in the indictment, or by plea, that the commonwealth created those, or similar pools, while it is distinctly charged that the defendants did; and this the jury have found to be true, and that the pools are no part of the canal, or necessary to its use. But suppose it had been proved that the commonwealth did create and maintain them, and notwithstanding the defendants had been convicted, that appearing only in the testimony and not on the record, and there being no bill of exceptions in such case to bring up the rulings of the court on the testimony, or the testimony itself, we could not review the trial and give relief, even if we supposed there was error. That can be done only by the court below.

But it is objected that it should have been averred in the indictment, it appearing that the canal was constructed by the commonwealth, that the company conducted and used their works differently from the use and management of them by the state, and that the indictment was defective for the want of such an averment. If the fact of entire accordance in the use of the canal by the company with that of the state were a defense, the case was open to them to make it, and the form of the indictment did not preclude the proof. The commonwealth was not bound to do more than to set forth facts constituting the offense,—which she did, as already said. That the defendants did not succeed in inducing the court and jury to believe that there was a similarity of user, or that if there was, it was a defense, is not a matter for our consideration. It ought to be understood by the people, as well as the profession, that this court has but a limited power of review in commonwealth cases of the grade of this. We cannot say what effect the proof should have had in any given case, for it cannot come before us as the law stands. We can only interfere where the record evinces error,—that is to say, when there has been a conviction, and no offense charged in the indictment, or a sentence not conforming to the law of the crime, or sustained by the conviction, or other matters which the record may show to be contrary to law.

It has not yet been decided that a nuisance created by the commonwealth, resulting from, but not necessarily a part or parcel of, its works, may not be a nuisance when continued by a company. The analogy between the position of the commonwealth as proprietor, and that of a corporation, is not exact on the question of liability and relative duty, because the one is sovereign, and the other subordinate. The *maxima*

relating to the one is, that it can do no wrong, while the other may, and for this reason acts resulting from sovereignty are not indictable when done by the sovereign power. The commonwealth can neither be sued nor indicted; but because this is so, I do not think it follows that such an immunity passes to the vendees of her property or rights. *Railroad Co. v. Duquesne Borough*, 46 Pa. St. 223, strongly sustains this view. It is in fact, however, not material to decide the point in this case.

In *Commonwealth v. Reed*, 34 Pa. St. 275, the whole question of liability was reduced to a question of law by the pleadings. The plea averred that the dam complained of as occasioning the nuisance was erected by the commonwealth as part of her canal, and as such was granted to the defendants upon the express condition that they were to maintain and keep up said canals and necessary works. There was a demurrer to this, which admitted every allegation in the plea. The decision therefore was, that the works themselves, having been created by the commonwealth, and granted to the defendants, could not be indicted as a nuisance. The effect of the creation and grant by the commonwealth was thus brought upon the record, and the determination of the question on review in this court was upon the case on the record. Very different is the position of the question here, even if it were essentially similar. There it appeared on the record; here it could only appear in the proof that the commonwealth created similar pools, or the very ponds or pools indicted. In the latter aspect, this court could take no cognizance of the action of the court on the subject. The questions would have been similar, and the position similar, if the canal itself had been indicted as a nuisance, and the plea had set forth its construction and grant to a purchaser by the commonwealth. The difference between the question in this case and the one before us is very marked. That would have involved the right of the state to construct such a work, while the question here is, Are the defendants indictable for so maintaining the works as to create *ab extra* a nuisance? That does not involve the construction, but the use. We think the court could not have arrested the judgment for the reasons urged by the defendants' counsel, taking it for granted that they were substantially those so ably argued here.

3. The third assignment of error is disposed of by what has been already said. We think there is an indictable offense sufficiently set forth in the indictment.

4. It is part of the penalty in convictions for public nuisances that the defendant be required to abate them; and the fact that the nuisance is on the land of a stranger is no reason for not abating it. The owner of the soil where the nuisance is must not be allowed to control the public right to have it abated; and what the law commands to be done for the benefit of the public an individual may not resist. *Smith v. Elliott*, 9 Pa. St. 375, rules this assignment of error against the defendants.

The averment that the nuisance is situate in the borough of Morrisville is a sufficient averment of being in the neighborhood of dwellings; certainly it is, after verdict, without objection previous to trial. So is the proximity of a highway sufficiently averred.

Seeing no reason for disturbing the action of the court below in this case, the sentence is affirmed.

INDICTMENT WILL NOT LIE against corporation for nuisance: *State v. Great Works etc. Co.*, 37 Am. Dec. 38.

ACTION FOR ASSAULT AND BATTERY will not lie against corporation: *Orr v. Bank of United States*, 13 Am. Dec. 588.

ARREST OF JUDGMENT, ON WHAT GROUNDS ARISE: *State v. Carver*, 77 Am. Dec. 275, and note 278.

INDICTMENT WILL LIE AGAINST CORPORATION, not municipal, for the creation and maintenance of a public nuisance: *Northern etc. Ry Co. v. Commonwealth*, 90 Pa. St. 305, citing the principal case.

WILMINGTON AND READING RAILROAD COMPANY v. STAUFFER.

[60 PENNSYLVANIA STATE, 574.]

IN ACTION BY OWNER OF LAND AGAINST RAILROAD COMPANY for damages in building their road, the jury may be properly instructed that they cannot compensate the plaintiff for risk of fire to his barn or its contents, nor hold the company responsible for anything that might be burned, nor for the risk of such burning. But if the proximity of the road to the building is such as to make danger from fire imminent, so that no man of common prudence would use it for the purpose of a barn, but would be driven from it and compelled to provide a barn elsewhere, then plaintiff is injured, and they must consider it in estimating the effect of the road upon the owner's property.

IN ESTIMATING DAMAGES ARISING FROM BUILDING RAILROAD upon private property, a comparison of its value at the time that the road was projected, and its value at the time of its completion, should be made, and while the jury cannot compensate for risk from fire, still the effect which

the proximity of the road to a barn would produce upon the market value of the property is a proper subject for compensation.

IN ASSESSING DAMAGES FOR CONSTRUCTION OF RAILROAD across private property, injury from proximity of buildings, interruption to their ordinary use of the avenues of passage, inconvenience caused by embankments and cuts, and such matters, are proper subjects for consideration in estimating the depreciation of the value of the property as a whole.

IN DETERMINING DAMAGES AGAINST RAILROAD for building their road upon private property in Pennsylvania, every agency which works an injury or depreciates its value, recognized by the common law, should be taken into consideration, if they are the direct and immediate consequence of the construction of the road.

THE opinion states the facts.

Darlington and Townsend, for the plaintiffs in error.

McVeagh and Davis, for the defendant in error.

By Court, AGNEW, J. In determining this case, we must consider only the instructions given by the court. Looking at the sum of seven hundred dollars for damages done to the barn, found in the statement of items returned by the jury it is possible they misunderstood or disobeyed the instructions. For this error the remedy was a new trial. But one question is involved in the assignments of error, and we may therefore follow the example of the plaintiff in error, and consider all together. The court told the jury distinctly they could not compensate the plaintiff for the risk of fire to his barn or its contents, and could not hold the company responsible for anything that might be burned, nor for the risk of such burning. They then said: "But if from the proximity of the road to the building, the danger of fire is necessarily so imminent that no man of common prudence would use it for the purpose of a barn, but would be driven from it and compelled to provide himself with a barn elsewhere, then the plaintiff is clearly injured in this respect, and the jury must consider it in estimating the effect of the road on his property." They then proceed to explain by stating that the property is depreciated to the extent that it is thus rendered unfit for its proper purpose and use; that the fairest test of the effect of a railroad on property is a comparison of its value at the time the road was projected with its value at the time of its completion; that in consequence of this privation of use, the property in the market as a farm would realize the owner just so much less in consequence of the road being there. This is the substance of the instructions, and it will be seen that the court did not authorize any compensation to be given for the

burning of the barn or for the risk of fire, but submitted only the effect which the proximity of the road to the barn would produce upon the price or market value of the property; and this was left to be counterbalanced by the advantages which the property would derive by the construction and use of the road. Thus it will be noticed that it was the depreciation of the value of the property arising from the road, and not an anticipated injury to the premises by fire, which was held to be the subject of compensation. The case is therefore not governed by *Railroad Co. v. Hummell*, 27 Pa. St. 99, and *Railroad Co. v. Lazarus*, 28 Id. 203. There is no difficulty in distinguishing it. The finding in Hummell's case was for one thousand dollars, damages that may be done to the buildings from fire by the ordinary use of locomotives, excluding fires arising from negligence or carelessness. That was an evident attempt of the jury to forecast the risk of fire by accident, and was rejected by this court as wholly uncertain and speculative, it being founded on an event that might never happen, and rested on a mere calculation of chances. But that actual depreciation of value which arises from the special circumstances of the location and construction of the road stands upon a different footing. Thus injury arising from the location in relation to the peculiar features of the premises, proximity to buildings, interruption of their ordinary use, and of the avenues of passage, inconvenience caused by embankments and deep cuts, and matters of this nature, have been always held to be proper subjects of consideration in estimating the depreciation of the value of the property as a whole. Therefore, it was said in Hummell's case itself that no one can examine our laws providing for public improvements without seeing that, in almost every instance, the legislature intended to provide compensation for every injury usually recognized as such by the common law, if committed by a private individual. In *Searle v. Lackawanna etc. R. R. Co.*, 33 Pa. St. 62, it was said, "for all the actual damages arising from the manner in which the road went through the plaintiff's land and affected his improvements." In *Patten v. Northern Cent. R. R.*, 33 Id. 432, "for injuries by cutting his land into portions that were inconvenient in shape, or inconveniently separated by deep cuts or embankments, and for any difficulty or diversion of a private road occasioned by the construction of the railroad above or below its grade." In *Watson v. Pittsburg etc. R. R. Co.*, 37 Id. 480, "it would be a narrow construction were we

to hold that the legislature did not intend an assessment of all the damages which are the direct and immediate consequence of the construction of the railroad to the whole tract of land through which it may pass. It is upon the whole tract the road is located, though only a part of it is actually occupied"; and the construction given to such charters has been "that they are intended to secure compensation for all such injuries as the common law recognizes as fit subjects of compensation": *East Pennsylvania R. R. v. Hottenstine*, 47 Id. 30; "allow for the disadvantages to the farm for the manner in which it may be cut by the projected or constructed road." See also *Harvey v. Lackawanna etc. R. R. Co.*, 47 Id. 434, and *Hornstein v. At. etc. R. R. Co.*, 51 Id. 90.

But this question has lately undergone examination, and the views of this court expressed by the chief justice in a well-considered opinion, in *Western Penn. R. R. v. Hill*, 56 Pa. St. 460. The subject there was a mill, cut off from the main land by an intervening railroad, and subjected to a loss of its custom by the danger and risk of crossing the track with horses and teams, and of hitching them at the mill. It was held that a depreciation of property by agencies that destroy its value would undoubtedly be a ground of recovery of damages at common law, and the law recognizes such injuries as fit subjects of compensation. It was such a depreciation in value which we think the court left to the jury in the present case to be found from a consideration of all the circumstances, and hence we think no real error was committed by the court below.

Judgment affirmed.

MEASURE OF DAMAGES FOR TAKING PRIVATE PROPERTY for railroad purposes: *Henderson etc. R. R. Co. v. Dickerson*, 66 Am. Dec. 148; *Brown v. Beatty*, 69 Id. 389; *Winona etc. R. R. Co. v. Waldron*, 88 Id. 100, and extended note 113-116, treating the subject, and also all points discussed in the principal case.

OWNER OF LAND THROUGH WHICH RAILROAD RUNS is not entitled to damages for increased rates of insurance which he has to pay: *Patten v. Northern etc. R. R. Co.*, 75 Am. Dec. 612, and note 616; see also note to *Winona etc. R. R. Co. v. Waldron*, 88 Id. 115, as to compensation for increased danger from fire.

DAMAGES ARISING FROM CUTS AND EMBANKMENTS: Note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 115.

PROXIMITY OF PROPOSED RAILROAD TO BUILDINGS, interruption of their ordinary use and of avenues of passage, inconvenience caused by embankments and cuts, and all matters of this nature, are proper elements in estimating damages to the property as a whole: *Hoffer v. Pennsylvania Canal Co.*, 87 Pa. St. 225, citing the principal case.

BERGEY'S APPEAL.

[60 PENNSYLVANIA STATE, 408.]

TRANSACTION DOES NOT AMOUNT TO GIFT BY WIFE, where the husband receives, counts, and keeps money paid her by her debtor, and afterwards invests it for her, but at the time of payment gives her no security for it, and eight or more years thereafter gives her a judgment note for it.

WHERE MONEY IS PAID WIFE, but the husband receives, counts, and keeps it, she is not bound to rescue it from him, or proclaim that it is not a gift. She may rest on the idea that his receipt of it, in her presence, was with intent to take care of it for her.

WHERE HUSBAND RECEIVES AND KEEPS MONEY paid to the wife, and which does not constitute a gift from her to him, he becomes the trustee for the wife, and equity will compel him to account to her for such money.

MONEY PAID WIFE, BUT RECEIVED, COUNTED, AND KEPT BY HUSBAND, and afterwards invested by him for her, does not constitute a gift from the wife to the husband, but makes him a trustee for her, and he cannot change the character of the transaction into a loan by giving a bond to secure its payment to her.

MARRIED WOMAN MUST SHOW BY CLEAR AND SATISFACTORY PROOF THAT PROPERTY CLAIMED BY HER is an acquisition by her own means, or the means of friends independently of her husband. This being established, she is entitled to the full benefit of the property as her separate estate.

THE opinion contains the facts.

Rogers and Boyd, for the appellant.

Hunsicker, and Corson and Weand, for the appellees.

By Court, THOMPSON, C. J. The material question in this case is as to the character in which Jacob Bergey received his wife's money. There was no dispute that he did receive it, amounting to some \$1,680, being her patrimonial portion. This the auditor finds; but at the same time he has found that he received it as a gift from his wife. The testimony relied on for this conclusion is that of Abraham Landis, who, after stating in chief the fact that he had paid Deborah Bergey fifteen hundred dollars "out of her father's and mother's estate" some seventeen or eighteen years ago, after her marriage with Jacob Bergey, on cross-examination testified as follows:—

"Deborah Bergey and her husband were together when I paid the money. Jacob picked up the money and counted it; and I think he did n't put it down again. I know that Jacob Bergey, at about this time, had bought his father's farm, and he told me he would put the money in there. He said that

they wanted this money; they had bought the farm." Charles Benner proved the payment to his sister, Mrs. Bergey, of \$180 about the same time.

The testimony of Landis, together with the fact that no note or judgment was given to the wife to secure the money for eight or nine years, is the sole foundation on which the auditor rests his conclusion that the money was obtained as a gift, and that the judgment was a fraud against Bergey's creditors. Not a word was spoken by the wife when her husband took up the money to count it, and put it in his pocket. Nor do we ever hear of a word thereafter to the effect that the wife had made a gift of it. No inference of a gift from the transaction as detailed could, we think, arise. She was not bound to attempt a rescue of it from him, or proclaim that it was not a gift. She might rest on the idea that his receipt, in her presence, was with the intent to take care of it for her. In *Johnston v. Johnston's Adm'rs*, 31 Pa. St. 450, this court said in a case of the nature of this, "as the law made it [the money] hers, it presumes it to have been received for her by her husband." That case contrasts the presumptions arising from the receipt of money by husbands, prior and subsequent to the act of 11th of April, 1848. In the first period, the presumption is, that he has received it under and by virtue of his marital power as his own; in the second, the presumption is the opposite, that he received it for his wife, the act of assembly having declared it hers, and for her "sole and separate use." To the same effect are *Grabill v. Moyer*, 45 Pa. St. 530, and *Millinger v. Bowman*, 45 Id. 522, in both of which *Johnston v. Johnston's Adm'r*, *supra*, is referred to as the rule under the act.

Applying these principles to the transaction disclosed by the proof, and uncontradicted, at the time the money was paid and taken possession of by Bergey, it seems to us that there was not a shadow of a reason for holding that there was a gift of it to him by his wife. Did anything subsequently transpire to disclose that this was the object of the transmission of the money, if such an expression be a proper one to characterize the unbidden seizure of it by the husband? We shall see.

If it was not a gift, the husband was a trustee for his wife, and whether he kept the money in his pocket or put it into real estate which he had purchased, honesty required that he should account to her for it. He could be compelled to do so in equity.

There is something like an argument by the auditor, that as

the wife assented to the money being invested in the real estate purchased by her husband, she could not reclaim it, as it was appropriated at her request. That, however, would be a gift, in one sense at least; but it is claimed that it is not that, but an appropriation for her own use. The idea was doubtless suggested by what was said in *Johnston v. Johnston's Adm'r*, *supra*. It was there held that the wife, having expressly directed the appropriation of money received by the husband, belonging to her, to be expended in a particular way for the comfort of herself and family, she was so fully the owner and proprietor of it she was not allowed to reclaim it against his estate on the footing of a loan or debt. The proof is wanting here to bring the case within that rule; for the evidence is wholly wanting to show a direction for its investment. It does not even appear in the testimony that Mrs. Bergey was present when her husband said he would put her money into the house he had bought; or if present, that she assented to it. Certainly she is not to be bound without her assent, and that is not to be assumed to have been given without some proof of it. The case cited above held the wife precluded from reclaiming the money, only because of her assent inferred from her express direction to use it in a particular way. As this was not shown in this case, we presume that it did not exist. We take no account of what Charles Benner says on the subject. He gives no fact to substantiate what he says he knows of the matter, or how he knows what he asserts, or when or where he learned it. Besides, the auditor holds him an unreliable witness. We have no reason for esteeming him otherwise.

But the length of time which transpired between the receipt of the money and the date of the bond given by Bergey, in trust to secure his wife, is dwelt on by the auditor as a circumstance negating the idea of a loan, especially as there was no promise of repayment when he obtained it. If a stranger had possessed himself of her money as did her husband, it will hardly be contended that a recovery as for a loan might not be had against him without a promise to repay it; and it was no less hers under the act, because her husband took it. The lapse of time, some eight or nine years, between the date of its receipt and the bond given to secure it, did not raise any presumption against the character of the original transaction, either as a loan or as money received in trust. While under some circumstances it might raise a bar to its recovery by reason of statutory limitations on the remedy, the charac-

ter of this transaction remained as at first. But Bergey was not bound to interpose the statute of limitations to bar the debt, or to defeat the trust in favor of creditors, even if he might. Their claims were, at the best, no more meritorious than hers. It was no fraud on them to give a judgment to secure his wife, there being no question of his receipt of her money, even if there was a lapse of nine years during which she trusted, and it may be "waited and hoped" for justice from him. It would have been a fraud upon this most intimate and confidential of all relations, if he had not done so.

But the auditor discarded the bond because it was the declaration of the husband of his indebtedness to his wife. That objection would be good for a great deal, in a proper case. But not in a case where the debt, by the receipt of the money, is fixed, settled, undisputed, and so found by an auditor. It is admitted that the giving of the bond includes in it an admission of the character of the original transmission of the money. Let it be understood that this would not be allowable to change the character of the original transmission. For instance, if there had been a gift of the money when it passed into the hands of the husband, and he had received it as such, a subsequent effort to change its nature into a loan would not be allowed to succeed, certainly as against creditors. But when the note or bond is entirely consistent with the evidence of the terms of the actual receipt of it, the rule ought not to apply. In *Johnston v. Johnston's Adm'r*, *supra*, we said that declarations made at the time of the receipt of the wife's money, or afterwards, were evidence against the estate of the husband of the intent with which it had been received; and in both the cases cited, of *Millenger v. Bowman*, and *Grabill v. Moyer*, *supra*, notes were given some time after the transmission of the money, and the wife's rights upon them were sustained. The mere lapse of time, while it properly superinduces scrutiny, does not change the principle on which the husband may be liable on account of the original transaction.

Perhaps it is hardly worth while to notice the fact that the wife asserted her claim as a creditor of her husband by virtue of her judgment, when property of his, on which it was a lien, was sold in 1862 by the sheriff, and it was allowed by the court. This, at least, showed the assertion of her rights when jeopardized, and that her claim now made on account of the money then received on her judgment is neither stale nor justly suspicious.

With that money and the aid of a friend, between whom and her husband no collusion is shown or found, she became the owner of the property, the proceeds of which have given rise to this litigation. It was bought by and deeded to her. It was sold on a mortgage given by her with her husband for a loan to her. After the payment of that lien, why shall she not be entitled to the overplus? There is much said by the auditor, and somewhat by the court, rather in generalities than specific objections to her claim. But waiving this, we cannot agree that these conclusions are correct on any basis assumed, after a careful examination of all the facts in the case. We think the auditor, even if he might set aside the judgment for fraud, had no sufficient evidence in any of the considerations noticed, and certainly not in the fact that the judgment was for too large an amount by the sum of the interest included in it. That was an easy mistake to make,—especially as it was held in *Grabill v. Moyer, supra*, that the wife was entitled to recover interest when the husband had assumed to pay it. It was easy to fall into the error that interest followed the principal, as an incident in such a case, without an express assumption. This simply was, therefore, not a ground for setting aside the judgment, and we do not discover any other sufficient ground.

The auditor exhibits a very laborious examination of cases to support his theories, and to sustain his ultimate conclusion. It is likely they do sustain peculiar points of view of portions of the case, but it is a coincidence that a large majority of them concur in maintaining married women's rights under the act of 1848, under almost any aspect of attack, instead of defeating them. That act is an enabling or enlarging act, and it is of the very nature of such acts that they are to be administered in the spirit of the rights enlarged by them. Such legislation implies an intention to reform or extend existing rights, and it cannot be that it is the duty of the courts to render them as unavailing as possible to the class intended to be benefited, by harsh and unpractical views and rules. Our line of decision under the statute has few deviations, in my judgment, from a due course. We hold the married woman to clear and satisfactory proof that property claimed by her is an acquisition by her own means, or the means of friends, independently of her husband. This being established, we have always given her the full benefit of it as her own separate estate, as the law declares it to be. In *Tripner*

v. Abrahams, 47 Pa. St. 221, we reversed one of our brethren for holding too stringent a view in the proof to establish the wife's rights of property, and asserted the rule that the proof by the wife of her means of acquisition, independent of her husband, must be "clear and satisfactory." This is a reasonable rule, which courts and juries may easily perceive and apply. We mean not to relax that in the least degree.

In conclusion, we cannot concur with the learned judge below that Mrs. Bergey is only entitled to the difference between the amount of money directly put into the land by her, and the lien created by her on it. We see no evidence or reason why the title, being in her by her own means and that of friends, without collusion on their part with her husband, and the use of his means, should not inure to her use. It was not intended for the creditors of her husband by these friends. That is the state of this case, so far as the Snyder and Boorse tracts are concerned.

As the record furnishes no evidence showing that Mrs. Bergey paid for the Price tract, she of course cannot receive the proceeds of it.

It appears that the Snyder and Boorse tract cost \$2,325, and the Price tract \$788.12, and the fund in court apportioned between them would give the Snyder and Boorse tract \$807.70, and the Price tract \$549.43.

And now, February 5, 1869, the decree of distribution made in the common pleas is reversed, and it is ordered and decreed that the money in court be paid as follows:—

To Deborah Bergey	\$807.70
To J. R. Hunsicker	337.42
To William P. Moyer	173.45
To Thomas M. Colder	38.56

RECEIPT AND APPROPRIATION BY HUSBAND of the wife's money with her knowledge and consent does not establish between them the relation of debtor and creditor, unless at the time he expressly agreed to repay it; and if without agreeing to repay it, he invests it in his business, and afterwards executes a bill of sale to secure her, the latter is void as against existing creditors: *Kuhn v. Stansfeld*, 92 Am. Dec. 681, and note.

AUDITOR CANNOT SET JUDGMENT ASIDE for mistake, although he might do so for fraud: *Meckley's Appeal*, 102 Pa. St. 453, citing the principal case.

WHERE HUSBAND SELLS PERSONAL PROPERTY of the wife, his declarations that it belonged to her are admissible on the question of ownership, and whether she had given it to him: *Musser v. Gardner*, 66 Pa. St. 247, citing the principal case.

MERE POSSESSION OF WIFE'S MONEY is no evidence that the title to it has been vested in the husband: *Hamill's Appeal*, 88 Pa. St. 367, citing the principal case.

EARNINGS OF WIFE ARE HER SEPARATE ESTATE: *McLemore v. Pinkston*, 67 Am. Dec. 167. So is a gift made to her: *Dunham v. Chatham*, 73 Id. 222; and generally, see *Kirkpatrick v. Buford*, 76 Id. 363, and extended note.

HALL'S APPEAL.

[60 PENNSYLVANIA STATE, 452.]

AGREEMENT IN RESTRAINT OF TRADE must be established by clear and satisfactory proof, in order to justify a court in restraining its breach by injunction. There must be no doubt or uncertainty in regard to its terms, or the consideration upon which it is founded.

CONTRACT IN WRITING MUST SPEAK FOR ITSELF, unless it is clearly shown that a stipulation was omitted through fraud or mistake.

WHEN ONE SELLS GOOD-WILL OF HIS BUSINESS for a valuable consideration, good faith requires that he do nothing which directly deprives the vendee of its benefits and advantages. If he holds himself out to the public by advertisement or otherwise as continuing his former business, or as carrying it on at another place, he may be enjoined from so doing.

THE opinion states the facts.

Crawford and Latta, for the appellant.

Cutler, for the appellee.

By Court, WILLIAMS, J. We have no doubt of the validity of such a contract, as is alleged in the bill, if founded on a sufficient consideration, or of the power of the court to restrain its breach by injunction. Our doubt in this case arises from the insufficiency of the proof to establish the existence of the alleged agreement. It cannot be inferred from the sale of the good-will of the business, and it is expressly denied in the answer. The sealed agreement between the parties, given in evidence by the plaintiff, contains no stipulation or covenant on the part of the defendant, either to retire from the business, or not to resume it again in the city of Philadelphia; and in this respect it fully corroborates and sustains the answer. Nor is there any sufficient evidence that such a stipulation was omitted through the fraud of the defendant, or the mistake of the parties. The only evidence from which such an inference could possibly arise is the testimony of Joseph R. and Alexander Black, but neither of these witnesses proves that it was one of the express terms and conditions of the

sale that the defendant was to retire from the business, and not to resume it again in the city of Philadelphia. On the contrary, their testimony amounts to no more than the declaration of the defendant's intention not to go into the business again in Philadelphia on account of the state of his health, which had compelled him to give it up. The fair inference from their testimony in connection with the blank left in the agreement is, that while the defendant declared it to be his intention and purpose not to resume the business, he was unwilling and refused to bind himself by a positive stipulation not to resume it at any time thereafter. This inference is greatly strengthened by the plaintiff's admissions to Balderston and Fogg, after the defendant had resumed the business, and by the fact that he furnished him, without remonstrance or objection, goods to carry on the business for two or three months after he had resumed it. As the alleged agreement is in restraint of trade, its existence should be established by clear and satisfactory evidence in order to justify the court in restraining its breach by injunction. There should be no doubt or uncertainty in regard to its terms, or the consideration upon which it was founded. Here the parties have put their contract in writing, and it must be allowed to speak for itself, unless it is clearly shown that the stipulation in question was omitted through fraud or mistake. Under the proofs in this case, a court of equity would not reform the agreement as written and sealed by the parties; and if they had not reduced their contract to writing, the evidence would be wholly insufficient to establish it, as alleged by the plaintiff.

But there is more of substance in the complaint as to the manner in which the defendant is carrying on the business of an undertaker. He sold the good-will of his business to the plaintiff for a valuable consideration, and good faith requires that he should do nothing which directly tends to deprive him of its benefits and advantages. The bill charges and the evidence shows that he is holding himself out to the public by advertisements, as having removed from his former place of business, No. 1313 Vine Street, to his present place of business, No. 1539 Vine Street, where he will continue his former business. It is clear that he had no right to hold himself out as continuing the business which he sold to the plaintiff, or as carrying on his former business at another place to which he has removed: *Hogg v. Kirby*, 8 Ves. 214; *Chinton v. Douglas*, 1 John. 174. While, therefore, the appellant is entitled

to have the decree of the court below, restraining him from conducting or carrying on his business of undertaking, etc., within the limits of the city of Philadelphia, reversed, it must be so modified as to restrain him from holding himself out to the public by advertisement or otherwise as continuing his former business, or as carrying it on at another place.

Let the decree be drawn up under the rule.

CONTRACTS IN RESTRAINT OF TRADE: *Duffey v. Shockey*, 71 Am. Dec. 348; *Beard v. Dennis*, 63 Id. 380; *Angier v. Webber*, 92 Id. 748, extended note 751; *Wright v. Ryder*, 95 Id. 186.

CONTRACT IN WRITING IS PRESUMED to contain the entire agreement: *Hahn v. Doolittle*, 86 Am. Dec. 757, and note. But evidence is admissible to show fraud or mistake: *Ramsdell v. Edgerton*, 41 Id. 503; *Waddell v. Glasell*, 54 Id. 170; *Baldwin v. Carter*, 42 Id. 735; and see *Kearly v. Duncan*, 73 Id. 179.

DODSON v. BALL.

[60 PENNSYLVANIA STATE, 492.]

RIGHT TO CONTROL DISPOSAL OF PROPERTY is fundamental, but must be so regulated as not to conflict with high public interests.

TRUSTS ARE EITHER SIMPLE OR SPECIAL; in the former, the trustee is passive and performs no duty, and the trust is purely technical. In the latter he is active, being an agent to execute the donor's will, and the trust is operative.

SIMPLE TRUST GIVES TO CESTUI QUE TRUST a right to the possession, control, and disposal of the property, and the legal estate becomes executed in him, unless it is necessary to remain in the trustee, to preserve the estate for the *cestui que trust*, or to pass it to others.

SPECIAL TRUST MAINTAINS LEGAL ESTATE in the trustee, to enable him to perform the duties devolved on him by the donor, and gives the *cestui que trust* only a right in equity to enforce the performance of the trust.

SIMPLE OR PASSIVE TRUST CANNOT CONTINUE the legal estate in the trustee, except for a proper and useful purpose, such as the law will protect; and as soon as the purpose fails or ceases to exist, the legal estate becomes executed in the *cestui que trust*.

EQUITY PRESERVES SPECIAL TRUST TO GIVE EFFECT TO DONOR'S RIGHT OF DOMINION over his property; as to a passive trust it permits it to fall in favor of public policy.

LIMITATION TO HEIRS ON FAILURE TO APPOINT enlarges a life estate to a fee.

WHEN LIFE ESTATE ONLY IS GIVEN, followed by general power of appointment, and on failure to appoint, to children, or to special heirs, the power to appoint will not enlarge the estate of the *cestui que trust* to a fee, and on failure to appoint, the children, or special donees in remainder, take by purchase, and not by way of limitation as heirs of the *cestui que trust*.

WHEN TERMS OF LIMITATION IN WILL can be fairly interpreted to mean "heirs" or "heirs of the body," an estate of inheritance will be presumed to have been intended by the testator.

WHEN INTENT OF TESTATOR SEEMS TO BE TO LIMIT ESTATE TO HEIRS of the life tenant, no matter how the intent is expressed, an estate of inheritance will vest in the life tenant, but when he intends to vest his estate in certain persons, though they may be the same as the heirs at law, the life estate will not be enlarged, and a power of appointment, general or special, will not change the rule.

WHERE UNMARRIED WOMAN CONVEYED HER ESTATE in trust for her separate use during life, without control from any husband, and on her death to be conveyed to persons named by will, or, in absence of appointment, to those to whom it would descend if she had died owning it in fee-simple, and she married and afterwards became discoverd, it was held that the trust thereupon failed.

THE opinion states the facts.

Wakeling and Price, for the appellant.

C. E. Lex, for the defendant.

By Court, AGNEW, J. Two opposite principles underlie the doctrine of trusts,—private dominion and public policy. Each has predominated as the judicial mind has inclined to the one or to the other. The right to control the disposal of property is fundamental; and yet this right must be regulated so as not to conflict with high public interests. In this state, the current set in strongly in favor of the former, in *Lancaster v. Dolan*, 1 Rawle, 231, wherein Chief Justice Gibson defended with great force the donor's right to control his gift in behalf of a married woman. That case was followed by many on that side, and among them are *Fisher v. Taylor*, 2 Id. 33; *Pullen v. Reinhard*, 1 Whart. 520; *Thomas v. Folwell*, 2 Id. 11; *Smith v. Starr*, 3 Id. 62; *Dorrance v. Scott*, 3 Id. 309; *Holdship v. Patterson*, 7 Watts, 547; *Wallace v. Coston*, 9 Id. 137; *Cochran v. O'Hern*, 4 Wils. & S. 95; *Ashhurst v. Given*, 5 Id. 323; *Rogers v. Smith*, 4 Pa. St. 93; *Eyrick v. Hetrick*, 13 Id. 491. The current, checked by *Harrison v. Brolaskey*, 20 Id. 299, was turned in the opposite direction by *Kuhn v. Newman*, 26 Id. 227, and ran then violently in favor of the policy of striking down trusts. That case was followed in the same direction by *Whitchote v. Lyle*, 28 Id. 73; *Williams v. Leech*, 28 Id. 89; *Price v. Taylor*, 28 Id. 95; *Bush's Appeal*, 33 Id. 85; *Naglee's Appeal*, 33 Id. 89; *McKee v. McKinley*, 33 Id. 92; and *Kay v. Scates*, 37 Id. 31. This counter-current received a check in *Guthrie's Appeal*, 37 Id. 9, which overthrew *Williams v. Leech*, *supra*, and strongly denied some of the positions of *Price v. Taylor*, *Naglee's Appeal*, and *McKee v. McKinley*, *supra*. In *Guthrie's Appeal*, *supra*, Woodward, J., who before

had been overborne by numbers, after a graceful compliment to the principle of *stare decisis*, gave his adherence to the new majority. But the counter-current, which had been merely checked in *Guthrie's Appeal*, *supra*, gathering force, prevailed again in *Kay v. Scates*, *supra*; the opinion, however, looking one way, while the judgment faced another, ruling the case by *Kuhn v. Newman*, and *Bush's Appeal*, *supra*. After spending its force in that direction, the current began to change with *Ralston v. Waln*, 44 Pa. St. 279, and in *Barnett's Appeal*, 46 Id. 409 [86 Am. Dec. 502], set back strongly in its former direction in favor of the donor's control, and has so continued. *Barnett's Appeal*, *supra*, was followed by *Girard Life Ins. and Trust Co. v. Chambers*, 46 Id. 485; *Shankland's Appeal*, 47 Id. 113; *Physick's Appeal*, 50 Id. 128; *Nice's Appeal*, 50 Id. 143; *Sheets's Estate*, 52 Id. 267; *Wickham v. Berry*, 55 Id. 70; *Freyvogel v. Hughes*, 56 Id. 228; *Bacon's Appeal*, 57 Id. 514, decided at Philadelphia, 1868; and *Rife v. Geyer*, 59 Id. 393, decided at Pittsburgh, 1868. The result of these conflicting principles and authorities is, that it is difficult to determine cases lying along the border. The present, in some of its aspects, is one of that kind. In order to decide it, it will be proper to refer to some leading and established principles in the doctrine of trusts. Trusts are of two kinds,—simple and special: *Vaux v. Park*, 7 Wils. & S. 25. In the former, the trustee is passive, and performs no duty, and the trust is there purely technical. In the latter, he is active, being an agent to execute the donor's will, and the trust is operative. A simple trust gives to the *cestui que trust* a right to the possession, control, and disposal of the property, and the legal estate becomes executed in him, unless when it is necessary to remain in the trustee to preserve the estate for the *cestui que trust*, or to pass it to others. A special trust, on the other hand, maintains the legal estate in the trustee, to enable him to perform the duties devolved on him by the donor, and gives to the *cestui que trust* only a right in equity to enforce the performance of the trust: Id. See also *Barnett's Appeal*, and *Rife v. Geyer*, *supra*. And where the trust is not active, the legal estate will remain in the trustee so long as it is necessary to preserve the estate itself, as in the case of a trust for a married woman to protect the estate from her husband; or a trust for a spendthrift son to protect it from his creditors; or to preserve contingent remainders: *Lancaster v. Dolan*, 1 Rawle, 247; *Pullen v. Reinhard*, 1 Whart. 520; *Thomas v. Folwell*, 2 Id. 11; *Wright v. Brown*, 44 Pa. St.

224; *Fisher v. Taylor*, 2 Rawle, 83; *Holdship v. Patterson*, 7 Watts, 547; *Ashhurst v. Given*, 5 Wils. & S. 823; *Eyrick v. Hetrick*, 13 Pa. St. 491; *Brown v. Williamson*, 36 Id. 838; *Barnett's Appeal*, 46 Id. 409; *Rife v. Geyer*, *supra*. As a consequence, it is a general principle that a simple or passive trust cannot continue the legal estate in the trustee, except for a proper and useful purpose, such as the law will regard and protect, and as soon as the purpose fails, or ceases to exist, the legal estate becomes executed in the *cestui que trust*. In the former case, equity preserves the trust to give effect to the donor's right of dominion over his property; and in the latter, in favor of public policy, permits it to fall as useless: *Freyvogle v. Hughes*, 56 Pa. St. 228; *McBride v. Smyth*, 54 Id. 250; *Rife v. Geyer*, *supra*.

In view of these principles, let us examine the trust in this case. Its principal features are these: Harriet S. Ball, the grantor as well as the *cestui que trust* in the deed, was the absolute owner of the property. She was a *feme sole*, without a marriage then in prospect. The coverture which took place two and a half years afterward had ceased by the death of her husband. The only useful purpose visible in the deed was the preservation of her property to her sole use during a coverture that might take place (it being before the act of 1848), and its transmission, by will or descent, if she died during coverture. The trust is purely passive, requiring no active duty except conversion for her benefit and advantage. That and the ulterior trusts are in point of fact immaterial and useless after coverture has ceased. There being no marriage in contemplation, and the subsequent coverture being ended by the death of Mrs. Dodson's husband, the trust must fall, and the legal estate be executed in her, unless it is necessary to support it as an independent provision for children or others who can claim hereafter as purchasers under the deed. The only ground even for a question on this point grows out of the primary limitation to herself for life. If upon that she has ingrafted a remainder to vest the estate in certain persons as purchasers by description, and not as heirs, it raises the question whether she has lost the control of her own property by such a provision without a marriage in view, or one new in existence. If the trust, as expressed, does not in fact break the course of descent, there seems to be no good reason to interpret it so as to divest her of her control of her own property, and the trust should fall.

The rule laid down is, that when an estate for life only is given, followed by a general power of appointment, and on failure to appoint to children or to special heirs, the power to appoint will not enlarge the estate of the *cestui que trust* to a fee; and on a failure to appoint, the children or special donees in remainder take by purchase from the donor, and not by way of limitation as heirs of the *cestui que trust*: 4 Kent's Com. 663; *Smith v. Starr*, 3 Whart. 66; *Anderson v. Dawson*, 15 Ves. Jr. 532; *Girard Life Insurance and Trust Co. v. Chambers*, 46 Pa. St. 490. A limitation to heirs on a failure to appoint unquestionably enlarges a life estate to a fee by the union of estates: *Ralston v. Waln*, 44 Id. 279; *Physick's Appeal*, 50 Id. 128; *Nice's Appeal*, 50 Id. 143. The question is, then, What effect should be given to the language of the ultimate limitations in this case? These are as follow: "And upon the decease of the said Harriet S. Ball, then do and shall grant and convey the said premises unto such person or persons, and for such estate and estates as the said Harriet S. Ball, by any instrument of writing in the nature of a will, under her hand and seal, executed in the presence of two or more subscribing witnesses, notwithstanding her coverture, shall direct, limit, and appoint. And in case of no such direction, limitation, or appointment, then do and shall grant and convey the said premises to such person or persons as would be entitled to the same if the said Harriet S. Ball had died intestate, seised of the said premises in fee-simple, and in such manner and for such quantity of estate as such person or persons would in such case be entitled to by law. Provided, also, that the several trusts hereby created shall not in anywise be changed, altered, or affected, without the consent of the said George B. W. Ball and Charles H. Ball, or their several successors, be first had and obtained."

In *Anderson v. Dawson*, *supra*, it was held that a settlement by a *feme sole*, in contemplation of marriage to herself for life, with a general power of appointment by will, and on failure to appoint, then in trust for her next of kin, their executors, administrators, and assigns, according to the statute of distributions, did not vest her with the absolute property in the fund, the next of kin taking by purchase. But Sir William Grant, master of the rolls, evidently considering it a mere question of interpretation, took the distinction between a limitation to the executors and administrators and a limitation to the next of kin, the former as to personal property, giving to the limita-

tion the same effect as a limitation to the right heirs in regard to real estate, and the latter resembling a limitation to particular heirs. This distinction is recognized by Judge Story, in his work on equity, volume 2, section 1394. The distinction was followed and applied in both ways in *Ralston v. Waln*, *supra*, where there were two deeds; and so clearly was it considered a question of interpretation only, the terms "legal representatives" were held to mean in one deed the next of kin, while in the other they meant executors and administrators; in one case giving to the *cestui que trust* a life estate only, and in the other enlarging it to an absolute estate. Then came the *Girard Life Insurance and Trust Co. v. Chambers*, *supra*, which was the case of an active trust of personal property for a son for life, where it was held that a trust in default of appointment "to such person or persons for such estates, and in such shares as by the laws of the state of Pennsylvania would be entitled to the same, as if the said S. E. W. had died intestate, and seised and possessed thereof," meant the next of kin. But there a manifest intent appeared from the active character of the trust, and the terms of the deed, to preserve the estate for the son's children. Then follow the cases of *Physick's Appeal*, 50 Pa. St. 128, and *Nice's Appeal*, 50 Id. 143, which carried the rule of interpretation quite as far on the opposite side in giving effect to the word "heirs," notwithstanding qualifying expressions denoting distribution. In the former, the devise was to trustees for the life of Emlen Physick, with power of appointment, and on failure to appoint, then "to be equally divided among the right heirs of my said nephew, Emlen Physick, to them, their heirs, executors, administrators, and assigns forever." In the latter case, the devise was to trustees for the separate use of Amanda Laws, and after her decease (there being no power of appointment) the trustees "shall grant and assign the said residue of my estate, real and personal, unto such person or persons as shall be the right heirs of my said daughter Amanda, their heirs, executors, administrators, and assigns forever, in such proportions as they would be entitled to, agreeably to the laws of Pennsylvania, in case my said daughter Amanda had died intestate, seised and possessed of the same in her own proper right."

In these cases it was held, notwithstanding the qualifying terms, that the interpretation of the limitation would carry the estate to the heirs, and consequently the life estate of the *ces-*

tui que trust was enlarged to a fee-simple. The doubted case of *Harrison v. Brolaskey*, 20 Pa. St. 299, may also be referred to, to show that the question is purely one of interpretation, and the reasons which influence the determination. The trust there was for the separate use of a married woman with power of appointment by will, and on a failure to appoint, "then in trust for all such person or persons as would, by the intestate laws of Pennsylvania, at the decease of the said Mary Harrison, have become entitled to the personal estate, if her said husband or any other husband had died during her lifetime." Lowrie, J., says: "The whole profit of it [the estate] is hers; she may dispose of it by will, and if she die intestate it goes to her representatives. These rights indicate an absolute estate, and such in equity it was, and such it was at law with us, unless there was sufficient reason for preserving the distinction between the legal and equitable title. It is preserved during the life of the husband in order to save it from him. But when he is dead, she is free from the law of her husband, and stands *sui juris*, and has a right to demand the control of what in equity is hers." *Harrison v. Brolaskey* is said, by Justice Read, in 46 Pa. St. 490, not to be law, unless reconcilable on the ground that the estate is not expressly limited to Mrs. Harrison for life. But it has some weight in the interpretation of language somewhat similar to that used in the present case, and accords with the general rules of interpretation in seeking the true intent of the donor: *Fearne on Remainders*, 188, 189. In the same respect the overruled and doubted cases of *Williams and Wife v. Leech*, 28 Pa. St. 89, *Naglee's Appeal*, 33 Id. 89, and *McKee v. McKinley*, 33 Id. 92, may be referred to. Those cases decided that a devise for life, with remainder to children and their heirs, and in some of the cases with superadded words of distribution, gave an estate of inheritance to the life tenant. The rule there laid down was also stated in *Price v. Taylor*, 28 Id. 95, in these words: "If, therefore, the remainder is to persons standing in the relation of general or special heirs of the tenant for life, the law presumes that they take as heirs, unless it unequivocally appears that individuals other than persons who are to take simply as heirs are intended." In *Guthrie's Appeal*, 37 Id. 16, this rule was denied by Judge Strong, who said the assertion was too broad. He was clearly right, for undoubtedly upon the terms of the wills in those cases the opposite presumption was true, the words being those of purchase and not of limitation.

So far, it may be said, therefore, the authority of these cases is overturned. But the cases still are authority for this, that whenever the terms of the limitation can be fairly and justly interpreted to mean "heirs" or "heirs of the body," an estate of inheritance will be presumed to have been intended by the testator. And in *Guthrie's Appeal*, 37 Id. 14, it is admitted that the words "children" and "issue" may be interpreted to mean heirs of the body when this is the evident intent of the testator. The decisions in all the cases show the undoubted tendency of the judicial mind in this state to follow the true intention of the donor, and whenever he means to limit an estate to the heirs of the life tenant, no matter how his intent is expressed, an estate of inheritance will vest in the tenant for life; but when he intends his bounty to vest in certain persons, though they may be the same as the heirs at law, the life estate will not be enlarged; and a power of appointment, whether general or special, will not change this rule. Then how does this case stand? The ultimate limitation was to "such person or persons as would be entitled to the same, if the said Harriet S. Ball had died intestate, seised of the said premises, in fee-simple, and in such manner and for such quantity of estate as such person or persons would, in such case be entitled to by law." The words are exactly commensurate with the law of descent, and operate precisely with it; the persons intended are none others than the heirs at law and all the heirs; the root of succession is the same; they are to take from her as though she died seised in fee-simple; the persons are the same; they are to be those who would take at law as though she died intestate. Their estates are to be the same. They are to take for such quantity of estate as they would be entitled to at law, and they are to take as heirs; for they are to take in such manner as they would in such case be entitled to by law. It would be impossible to conceive of a more comprehensive and accurate periphrasis of the word "heirs" than is contained in these words. So complete are they that they would carry a life estate which the law confers to the husband, who, surviving her, would be entitled by them to his curtesy estate. Hence, there can be no reason found to sustain the trust in order to exclude the husband.

The words of the limitation being so exactly commensurate with the line of descent, there is no reason for upholding the trust after the life tenant has become discoverd by the death of her husband, in order to carry out a special intent. The

trust being passive, the *cestui que trust* being armed with a power of appointment by will, the ultimate limitation being exactly coincident with the course of descent, and she being discovert, it has now no useful or valuable purpose to subserve, no special intent to fulfill, no right of the donor to protect, and no reason exists, therefore, why the trust should not fall. The ultimate limitation was superadded only to meet the contingency of dying during coverture without an appointment by will. The great underlying principle of private dominion is not affected; while the other, public policy, requires the trust to be struck down. This being the case, it is evident that the concomitant proviso that the trust should not be changed or altered without the assent of the trustees is of no importance. The trustees had no interest in it; the trust was passive, and the provision useless, except to protect against changes which might result from the influence of the husband. Indeed, it was wholly useless, as no power to revoke or to change was reserved: *Lancaster v. Dolan*, 1 Rawle, 231; *Wright v. Brown*, 44 Pa. St. 224. Nor is the power of sale to convert and reinvest on the same trusts sufficient to prevent the trust from falling in such a case. It was expressed to be for her own benefit, and was but an incident to protect the trust property during coverture. Now, being *sui juris*, the provision is not needed. Upon the whole, then, the trust being passive, and the trustees not needed to protect any other interest, Mrs. Dodson being *sui juris*, and competent to exercise any power which had been vested in the trustees, the ulterior trusts not being intended to protect any special interest, but being exactly commensurate with her own power and estate as absolute owner, there is no proper or useful purpose to uphold the trust, and it consequently fell when she became discovert. The plaintiff is therefore entitled to a decree, according to the prayer of her bill.

The decree reversed, and a decree to be drawn up submitted and filed.

ACTIVE TRUSTS, WHAT ARE, AND LAW CONCERNING THEM DISCUSSED: *Barnett's Appeal*, 86 Am. Dec. 502, and note 512.

SPECIAL TRUST VESTS ESTATE IN TRUSTEE as long as the execution of the trust requires it, and no longer: *Stacey v. Rice*, 67 Am. Dec. 447. Trust to hold for the separate use of married woman during life is special; if the woman becomes *sole*, the trust ceases, and the legal estate vests in her: *Stacey v. Rice*, 67 Id. 447, and note 451.

RULE IN SHELLEY'S CASE: *Stacey v. Rice*, 67 Am. Dec. 447, and note 450; *Carr v. Estell*, 63 Id. 548, and note.

WHERE EXPRESS ESTATE FOR LIFE IS GIVEN IN TRUST, and the remainder is not to heirs or issue generally, a power of appointment will not enlarge the estate to a fee: *Springer v. Arundel*, 64 Pa. St. 223; *Williams's Appeals*, 83 Id. 388, both citing the principal case.

WHERE PROPERTY IS GIVEN TO WOMAN, either before or after marriage, for her sole and separate use during her life, with power to devise it to whom she pleases, and on failure to do so, that it should go to her heirs, the restrictions apply to a state of coverture, and upon her becoming discovert the trust falls, and she is entitled to the property absolutely: *Hepburn's Appeal*, 65 Pa. St. 472; *Megargee v. Naglee*, 64 Id. 218; *Tucker's Appeal*, 75 Id. 356; *Delbert's Appeal No. 1*, 83 Id. 467, all citing the principal case.

WHEN ACTIVE TRUST IS CREATED to give effect to some well-defined lawful purpose of the testator in relation to his family, it will be sustained whether the *cestui que trust* is *sui juris* or not: *Williams's Appeals*, 83 Pa. St. 388, citing the principal case.

WHERE WORD "HEIRS" IS USED AS WORD OF PURCHASE, it means "statutory heirs"; in other words, those persons who would take the estate not disposed of by last will and testament: *Clark v. Scott*, 67 Pa. St. 452, citing the principal case.

TRUE INTENTION OF DONOR WILL BE FOLLOWED, and when he means to limit an estate to the heirs of the life tenant, no matter how the intent is expressed, an estate of inheritance will vest in the tenant for life; but when he intends to vest the estate in certain persons, though they may be the same as the heirs at law, the life estate will not be enlarged: *Hafer's Appeal*, 80 Pa. St. 355, citing the principal case.

WHEN PURPOSES FOR WHICH TRUST was created have ceased, the law executes the legal title in the remainderman, without the formality of a conveyance, and the trust falls: *Westcott v. Edmunds*, 68 Pa. St. 37, citing the principal case.

EVANS v. HAMRICK.

[61 PENNSYLVANIA STATE, 19.]

RENT NOT DUE IS INCIDENT OF REVERSION, AND PASSES WITH IT TO ASSIGNEE IN BANKRUPTCY OF LANDLORD, as against his judgment creditor who served the tenants with an attachment in execution, after which and before the rent fell due, the landlord was decreed a bankrupt, and an assignee appointed.

ATTACHMENT in execution on a judgment recovered by Edward Evans against Owen Evans, and served upon Hamrick and Cole, as garnishees. John Pollock and Jacob R. Castleberry, being the owners of certain real estate in Philadelphia, leased it, October 15, 1866, to Read and Cole, for five years, at an annual rent of six thousand dollars, payable quarterly, on the 15th of January, April, July, and October of each year. Read and Cole assigned the lease September 16, 1867, to Hamrick and Cole, the garnishees; and afterwards, on November 20,

1867, Pollock and Castleberry conveyed the premises to Owen Evans, the judgment debtor. The attachment was served upon the garnishees, November 21, 1867. Afterwards, on December 7, 1867, the judgment debtor petitioned the United States district court to be discharged as a bankrupt; and on December 12th, he was decreed a bankrupt, and his assignee appointed January 6th, following. The rent falling due January 15, 1868, was claimed by the assignee. It was agreed that if the court should be of the opinion that the plaintiff was entitled to anything, judgment should be entered in his favor for so much as the court might think due, without interest; and if the court was of the opinion that the plaintiff was not entitled to any of the rent, judgment was to be entered for the garnishees, with costs. The court gave judgment for the garnishees, and the plaintiff assigned error.

T. R. Elcock, for the plaintiff in error.

J. B. Townsend, for the defendants in error.

By Court, AGNEW, J. At the time of the service of the attachment, Hamrick and Cole, the garnishees, were tenants for a term of years under rent reserved, payable quarterly. Owen Evans, the defendant in the judgment, had purchased their landlord's reversion. The rent in question did not fall due until the following January, after service of the attachment. In the mean time, Owen Evans was decreed a bankrupt, and his rights of property, including the reversion, passed to his assignee in bankruptcy. Clearly, the rent which had not fallen due followed the reversion, and passed with it to the assignee. It is to be noticed in the outset, this is not a foreign attachment, but an execution attachment. In foreign attachment the land itself can be attached, and a lien obtained which carries with it the accruing rents. But an attachment in execution cannot be levied of land,—that the *f. fa.* must reach; the attachment is levied only of debts or choses in action. In this case, there was not even a personal covenant, and the garnishees were liable to Owen Evans only through privity of estate. But this is of no moment, as had he been their landlord by covenant, then the rent not yet due was not a debt. It was an incident of the reversion,—a part of it,—and was itself therefore a part of the realty; and a levy on the reversion which it was competent for the plaintiff to have made on a *f. fa.* would have fastened upon the rent

as its incident, and carried it over by a sale to the purchaser of the reversion: *Menough's Appeal*, 5 Watts & S. 432; *Boyd v. McCombs*, 4 Pa. St. 146; *Johnson v. Smith*, 3 Pen. & W. 500 [24 Am. Dec. 339]; *Bank of Pennsylvania v. Wise*, 3 Watts, 404. When the attachment was laid in the hands of the garnishees, they were not debtors to Owen Evans. Had the rent fallen due afterwards, then on the principle of after-accruing funds coming into their hands, the attachment might have held the rent. But before this event happened, the reversion to which the rent was incident passed out of Evans into his assignee in bankruptcy by operation of law. There was, therefore, no debt for the attachment to operate upon. The land, that is the reversion, in the hands of Owen Evans was not subject to the lien of the plaintiff's judgment. Nor had he even the lien of a *fi. fa.* on the land. There was nothing therefore to arrest the passing of the title to the reversion, and preserve it for the plaintiff. The judgment was right, and must be affirmed.

Affirmed.

RENT NOT DUE IS INCIDENT ON REVERSION: *Johnson v. Smith*, 24 Am. Dec. 339; *Martin v. Martin*, 61 Id. 264; and passes to the assignee of the reversion, if there is no reservation: *Johnson v. Smith*, *supra*; *Miller v. Stagner*, 38 Id. 178; *Childs v. Clark*, 49 Id. 164; *Mussey v. Hek*, 55 Id. 234; *Martin v. Martin*, *supra*; and a purchaser at execution sale is within the meaning of this rule: Note to *Jackson v. Ramsey*, 15 Id. 251; *Moore v. Turpin*, 40 Id. 589; *Snyder v. Riley*, 40 Id. 602; *Casey v. Gregory*, 56 Id. 581; *Martin v. Martin*, *supra*; although such purchaser is not entitled to rent paid in advance after the rendition of the judgment, in accordance with a stipulation in the lease: *Farmers' and Mechanics' Bank v. Elge*, 36 Id. 130; and payment of rent in advance is good as a grantee of the premises: *Stons v. Patterson*, 21 Id. 156.

TINICUM FISHING COMPANY v. CARTER.

[61 PENNSYLVANIA STATE, 21.]

PRESCRIPTION RESTS UPON PRESUMPTION OF GRANT, which has been lost by process of time; and therefore no prescription can have a legal origin where no grant could have been made to support it.

SEVERAL AND EXCLUSIVE FISHERY IN NAVIGABLE RIVER CANNOT BE ACQUIRED BY PRESCRIPTION, in Pennsylvania, for no grant could have been made to support the right.

PROPRIETARIES OF PENNSYLVANIA AND NEW JERSEY NEVER OWNED BED OF DELAWARE RIVER, but their respective grants extended only to low-water mark on either side; and the bed of the river and the river itself remained in the crown, and passed by force of the revolution and of

the treaty of peace to the two states, to be owned and enjoyed on the same principle as a navigable river flowing between two coterminous nations.

SEVERAL AND EXCLUSIVE FISHERY IN DELAWARE RIVER, OPPOSITE ANY PART OF SHORE, whether by right of title to the soil, or derived by grant from the riparian owner, depends, in Pennsylvania, upon the acts of the assembly of 1804 and 1809; and no such fishery can be established in the river without proving a compliance with those acts.

EASEMENT PROPER, WHEN GRANTED TO ONE IN GROSS, IS MERE PERSONAL RIGHT, and cannot be assigned or inherited; but a *profit à prendre*, when in gross, is treated as an estate or interest in the land itself, and may therefore be for life or inheritance.

RIGHT TO TAKE FISH IS PROFIT À PRENDRE, and it requires for its use and enjoyment exclusive occupancy during the period of fishing, and implies the right to fix stakes and capstans for the purpose of drawing the seine, and the occupancy of the bank at high tide, as well as the space between high and low water mark, as far as may be necessary and usual.

LAND, OR INTEREST IN LAND, CANNOT BE PRESCRIBED FOR; and it seems a *profit à prendre* is within the rule, especially when it is not pleaded in a *que estate*, but in a man and his ancestors.

PRESUMPTION OF KNOWLEDGE AND ACQUIESCENCE OF OWNER THAT ESTATE IS UNDER CLAIM OF RIGHT IS REQUIRED in all cases of prescription; and there is a distinction in the nature and amount of the evidence sufficient to establish by prescription an ordinary easement, where there is a dominant and a servient tenement, and one merely in gross, and between prescribing in a *que estate*, and in a man and his ancestors.

PRINCIPLE THAT WHATEVER INCORPOREAL HEREDITAMENT MAY BE GRANTED MAY ALSO BE ACQUIRED BY LONG AND UNINTERRUPTED USER, is not one without exception. A right or privilege claimed by prescription must be such as must reasonably be presumed to have been granted, and not one the exercise of which would destroy the usufruct of the grantor's property.

CASE by Paul B. Carter against the Tinicum Fishing Company, for disturbing a right of fishery on the Delaware River, to twelve fourteenths of which the plaintiff claimed title. It was admitted that the defendant was incorporated in 1863, and that it owned the land opposite the fishery. The plaintiff's evidence showed that in 1748 Christopher Taylor owned the defendant's land and the fishery in question, and died leaving a will, which was proved the same year, by which he devised the land to John Taylor, and "his fishing-place" to David Sanderlin and his heirs. In 1752 the fishery was set off, as appeared from the records of the orphans' court, by a decree in a proceeding for partition of David Sanderlin's estate "to the representatives of Mary Claxton, late wife of James Claxton," and daughter of Sanderlin. In 1805 deeds of the fishery were made to Joseph Carter, reciting that the grantors were "heirs of James Claxton, who was one of the heirs of David Sanderlin." In

1830 the will of Joseph Carter was proved, by which he devised the fishing right to Joseph Carter, Jr., and Cloud Carter, his sons. In 1832 Cloud Carter sold his interest to his brother William, and in 1846, William's interest was sold on execution to the plaintiff. Joseph Carter, Jr., afterwards died, leaving six brothers and one sister, to whom his interest descended. Five of these brothers conveyed their shares to the plaintiff, who thus claimed to have acquired twelve fourteenths of the whole. The plaintiff also gave evidence to show the possession of the fishery by Joseph Carter, Sen., and of his various descendants down to the plaintiff, for sixty or seventy years before the action was brought. It appeared that the parties claiming the right, during the fishing season, threw out nets into the river from a wharf, known as Hart's wharf, to Darby Creek, about a mile in extent, and drew them in on the shore. The defendant's evidence went to show that the fishery had been obstructed and abandoned long before its incorporation, and that few fish could now be caught there. It also gave in evidence two licenses from the port wardens of Philadelphia, authorizing the erection of the pier and cribs complained of. The defendant submitted the following points: 1. That the evidence failed to show any title to the fishing right claimed to be in the plaintiff; 2. That no title to such fishing right could be shown by use only; and 3. That the defendant had a right to maintain a proper wall for the protection of the bank of the stream, and was not responsible for any damages which might result thereto, even if any adverse fishing right existed. The court disaffirmed the first point, saying that there was evidence for the consideration of the jury. As to the second point, the court answered at some length that the plaintiff had failed to exhibit an express grant, but that title to a fishery might be established by prescription. The court disaffirmed the third point. The plaintiff had a verdict for thirty-five dollars, and the defendant assigned error.

W. Ward and W. McVeagh, for the plaintiff in error.

W. Darlington, for the defendant in error.

By Court, SHARSWOOD, J. Independently of the acts of assembly, there is no exclusive right of fishing by the riparian proprietor opposite to his shore in any navigable river: *Carson v. Blazer*, 2 Binn. 475 [4 Am. Dec. 463]. In England the king has no power, and since *Magna Charta* never had, to

grant an exclusive right of fishing in an arm of the sea: *Blundell v. Catterall*, 5 Barn. & Ald. 268; *Brown v. Kennedy*, 5 Har. & J. 203 [9 Am. Dec. 503]. A private and several right to fish in a navigable river must have had its origin before Magna Charta: Angell on Tide Waters, 25, note; *Mayor of Carlisle v. Graham*, L. R. 4 Ex. 369. An arm of the sea extends as far into the interior of the country as the water of fresh rivers is propelled backwards by the ingress and pressure of the tide: Angell on Tide Waters, 73; *Rex v. Smith*, 2 Doug. 441; so as to occasion a regular rise and fall: *Peyroux v. Howard*, 7 Pet. 824. In England, there are such several and exclusive fisheries in navigable rivers attached to manors, either by early grant from the crown or by prescription, because there might have been such a grant on which to found it. In this state there can be no such prescription. Prescription rests upon the presumption of a grant, which has been lost by process of time. No prescription, therefore, can have a legal origin where no grant could have been made to support it: 2 Bla. Com. 265; *Gateward's Case*, 6 Coke, 59 b; *Lockwood v. Wood*, 2 Q. B. 64. Neither the proprietaries of Pennsylvania nor New Jersey ever owned the bed of the Delaware. Their respective grants were to low-water mark on either side. The bed of the river and the river itself were in the crown, and passed by force of the Revolution and the definitive treaty of peace, September 3, 1783, recognizing their sovereignty and independence, to the two states, to be owned and enjoyed on the same principle upon which a navigable river flowing between two coterminous nations is held. This does not deny to the legislatures of these respective states by compact and laws the power to regulate and restrain the common right of fishing, both as to riparian proprietors and others: *Bennett v. Boggs*, 1 Bald. 76. The right of the plaintiff below to any exclusive fishery in the Delaware opposite to any part of the shore, whether by right of title to the soil or derived by grant, actual or presumed, from the riparian owner, depends upon statute. It is put on that ground by the decision of this court in *Hart v. Hill*, 1 Whart. 124. The act of assembly, entitled "An act to regulate the fisheries in the river Delaware and its branches, and for other purposes," passed February 8, 1804, 4 Sm. L. 118, and the supplement of February 23, 1809, 5 Id. 5, under a compact with New Jersey, are the statutes to which we must refer. They define "a pool or fishing-place" to be "from the place or

places where seines or nets have been usually thrown into the water to the place or places where they have been usually taken out; or from the place or places where they may be hereafter thrown into the water, to the place or places where they may be taken out"; and the fourth section of the act of 1804 provides "that whenever any fishery is occupied upon the river Delaware, either the land-holder, tenant in possession, or some respectable person appointed by the fishing company, shall apply to the prothonotary of the respective county where such fishery may be, and give a bond, etc., and shall moreover give unto the said prothonotary a description in writing of their pool or fishing-place, together with the name of the township or place in which it is situated." The object of the legislature manifestly was to give notice to all concerned of any pool or fishing-place where an exclusive right to fish was claimed, and especially if claimed by a fishing company,—not land-holders or tenants in possession,—to give notice to the riparian proprietor, and purchasers from him. Wherever such fishery is dissevered from the ownership of the bank, how else than by some such record are purchasers to be protected? No possession or mark on the ground would indicate to them that there was any adverse claim. No evidence was given on the trial in the court below of any entry in the prothonotary's office of the pool or fishing-place occupied by the plaintiff, and those under whom he deduced his right. The *onus* of showing this was upon him. Without proving a compliance with the law, he showed no right to any exclusive fishery in the river. "It is hardly necessary to remark," said Huston, J., in *Hart v. Hill*, 1 Whart. 132, "that it is so much of the river, etc., that is the fishing-place, and not so much of the bank."

The plaintiff below, therefore, could not pretend to any title to a several and exclusive fishery in the river. He did claim a right to draw seines on the soil of the riparian proprietor, not as appurtenant to any dominant tenement, but as an incorporeal hereditament and easement in gross vested in him, and derived from his ancestors or their grantees in fee-simple. He had no dominant tenement in the river to which the shore was servient, as was the case in *Gray v. Bond*, 2 Brod. & B. 667. He did not prescribe in *que* estate, in himself and those whose estate he held. He did not claim a mere passage over the land, but a right to take fish there,—a profit *a prendre in alieno solo*. That a profit *a prendre*, as a rent issuing out of

land, may be granted or prescribed for in gross in fee may be admitted. Whether a profit *a prendre*, as a common of pasture, a right to dig turves, or clay, or coal, may be is not so clear. The cases and opinions are discordant. But something more was claimed here than the right to take fish. "A fishery is in the river," says Huston, J., "and is not the space between high and low water mark, though the use of that space may be necessary in the use of it, and may be included in the term 'fishery.' The men employed in carrying the rope attached to one end of the seine may walk on the space between high and low water; and on the same space may place logs or boards or stones to make what is called a pound, in which to throw the fish when taken out of the net, and on that space do all that has been usual and is necessary to the use of a fishery": *Hart v. Hill*, 1 Whart. 137. Whether the plaintiff meant to claim an exclusive right, or in common with the owner of the soil, does not appear. I infer that his claim was exclusive. That a fishing-place may be granted separate from the soil may be considered as settled in this state, in *Hart v. Hill*, 1 Id. 124. It is to be noted that no question arose in that case, nor was any point decided as to the nature of such a grant. It would seem, however, to have been considered an incorporeal hereditament. That there may be the grant of an easement in gross personal to the grantee is not to be denied. Chancellor Kent says of a way: "If it be a right of way in gross, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It dies with the person, and it is so exclusively personal that the owner of the right cannot take another person in company with him": 3 Kent's Com. 420. However, it was decided in *Wickham v. Hawker*, 7 Mees. & W. 63, on the authority of *Duchess of Norfolk's Case*, in the Year Books, 12 Hen. VII. 25, pl. 5, S. C., 13 Hen. VII. 13, pl. 2, that a license reserved by a grantor of land, not for mere convenience and pleasure, but for profit, implied the right to employ servants, and also the right to assign it to others. There a reservation of a liberty to hunt, fish, hawk, and fowl on the granted premises to the grantor and his heirs was sustained as a new grant, though for all that appears it was in gross. Professor Washburn, in his valuable work on easements, page 8, has laid down, as the result of the authorities, this broad position: "A man may have a way in gross over another's land, but it must, from its nature, be a personal right, not assignable nor inheritable; nor can it be made so by

any terms in the grant any more than a collateral and independent covenant can be made to run with the land." In *Ackroyd v. Smith*, 10 C. B. 164, there was a grant of a certain close in fee, with a right to the owners and occupiers thereof, and all persons having occasion to resort thereto, of passing and repassing for all purposes over a certain road, and the grantor had conveyed the close with the appurtenances to the defendants, who pleaded that they had committed the trespass complained of in using the road for their own purposes; it was held that the right in question was in gross, did not inhere in the land, nor concern the premises conveyed, or the mode of occupying and enjoying them, and therefore did not pass to the defendants by assignment. Mr. Justice Cresswell said: "If a way be granted in gross it is personal, and cannot be assigned. So common in gross *sans nombre* may be granted, but cannot be granted over, *per Treby*, C. J., in *Weekly v. Wildman*, 1 Ld. Raym. 407. It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it; nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee." So in *Post v. Pearsall*, 22 Wend. 425, which was a claim for a landing and place of deposit for merchandise in the course of transshipment on the bank of a navigable river, Chancellor Walworth said: "Nor can it be sustained as an ordinary easement, founded on a presumed grant from the owner of the premises, in which the right or easement is claimed. Such easements are either personal and confined to an individual for life merely, or are claimed in reference to an estate or interest of the claimant in other lands as the dominant tenement; for a profit *a prendre* in the lands of another, when not granted in favor of a dominant tenement, cannot properly be said to be an easement, but an estate or interest in land itself." This principle, Mr. Washburn thinks, furnishes a clew to reconcile the authorities. "The distinction seems to be this: If the easement consists in a right of profit *a prendre*, such as taking soil, gravel, minerals, and the like, from another's land, it is so far of the character of an estate or interest in the land itself that if granted to one in gross, it is treated as an estate, and may, therefore, be for life or inheritance. But if it is an easement proper, such as a right of way and the like, and is granted in gross, it is a mere personal interest, and not inheritable": Washburn on Easements, 9.

There is a very plain distinction between a grant of such a

profit exclusive of the owner and one in common with him. It was held in *Caldwell v. Fulton*, 31 Pa. St. 475 [72 Am. Dec. 760], that the grant of a right to dig and carry away stone coal, in the lands of the grantor, without stint, was the grant of an interest in the land itself. But it is different when there is such a right granted in common with the owner of the soil, as in *Johnstown Iron Co. v. Cambria Iron Co.*, 32 Id. 241 [72 Am. Dec. 783], *Clement v. Youngman*, 40 Id. 341, and *Gloninger v. Franklin Coal Co.*, 55 Id. 9 [93 Am. Dec. 720]. Such a right may be granted in fee and assigned, but is an estate in the land distinguishable from a mere easement upon or over it. A fishing-place is in the same category. A right to take fish is a profit *a prendre in alieno solo*. It requires for its use and enjoyment exclusive occupancy during the period of fishing. It implies the right to fix stakes or capstans for the purpose of drawing the seine and the occupancy of the bank at high tide as well as the space between high and low water mark as far as may be necessary and usual. The grantee in the nature of things must have exclusive possession for the time he is fishing and for that purpose; the grantor at all other times and for all other purposes. Land, or an interest in land, cannot be prescribed for: 2 Bla. Com. 264. It may well be questioned whether such a profit *a prendre* can be, especially when not pleaded in a *que* estate, but in a man and his ancestors. That kind of user for twenty-one years and upwards which may be sufficient to raise a presumption of a grant of a mere easement will not support a claim for an interest in the land itself or its profits. "An annual entry upon another man's land to cut timber, to feed cattle, to hunt or fish, can never give title," says Chief Justice Woodward, in *Wheeler v. Winn*, 53 Pa. St. 122 [91 Am. Dec. 186].

But if the right claimed here had been a mere ordinary way in gross, the evidence would not have been sufficient to create the presumption of a grant. Had it been set up as appurtenant or annexed to a several fishery in the river or to adjoining lands, had there been a dominant and servient tenement, if the plaintiff had prescribed in *que* estate, in him and those whose estate he had,—it might have been otherwise. There is a manifest reason for a distinction in the nature and amount of the evidence required in case of such an easement and one merely in gross. There is a certainty as to the owners and occupiers of the land of which the appurtenancy is predicated, which does not exist where the claim is in gross. A fair pre-

sumption arises of knowledge that the exercise of it is under a claim of right. This is absolutely required in all cases of prescription: Washburn on Easements, 86. The circumstances of the enjoyment must be such that the knowledge and acquiescence of the owner may be presumed: *Gray v. Bond*, 2 Brod. & B. 667. *Lex intendit vicinos vicini facta scire*. If I should see the owner or occupier of an adjoining lot or farm or his servants constantly crossing my land to the highway, I may with reason, and without being unneighborly, dispute it, and insist upon an acknowledgment that it is only permissive, so that it may not grow into right. But if a stranger with whom I may well be presumed to be unacquainted, or his son or collateral heir after his death, walks over occasionally and especially at long intervals, on what ground is it to be inferred that I know it to be under any pretense of title? Must a farmer see to it that every one who crosses his field to gun or fish asks his permission? Could a man establish a presumptive right by showing that regularly every year for twenty-one years and more, on the 4th of July, he had, in view of the proprietor, walked up to his well or spring, and without his permission drawn a bucket of water? As well might an angler, resorting constantly to some shady spot on the bank of a stream, set up in process of time a presumptive right against the owner of the soil, of passage and of fishery. Many a lover of the sport for more than a quarter of a century has pursued every season one of our mountain brooks for miles of its course for the speckled trout with which they abound.

A man who owns land on the bank of a navigable river, in which there is a common right of passage and fishery, is not under the necessity of keeping himself in hot water all his lifetime, by warning off or prosecuting every trespasser who comes there to fish with the rod or the seine, nor can he be expected to recollect and recognize that the same man who is there fishing one year returns the next, much less be bound to inquire into his family and lineage in order to be sure that his claim of right, even if he knows it to be such, is not transmitted to his heirs. Nay, if he can pass his right by lease or assignment, or exercise it by agent or servant, it may every year be in the hands of a different person. It is manifest that no title by such kind of user to an inheritable easement in gross could be safely allowed to grow up. All this is especially true of the use of the beach of a navigable stream where men, boys, and cattle wander *ad libitum*. Thus, where a party

owned land adjoining a beach, but there being no fence between his land and the beach, his cattle were accustomed to pass on to the beach and thence over adjoining beaches, it was held not to be such an adverse enjoyment as to gain a prescriptive right thereby: *Donnell v. Clark*, 19 Me. 174. So a person cannot acquire a title by prescription by pasturing his cattle in an open common, training field, or highway: *Thomas v. Marshfield*, 13 Pick. 240; *First Parish v. Beach*, 2 Id. 60, note.

The cases referred to by the learned judge below were all, except one, cases of a dominant and servient tenement,—prescriptions in *que estate*. As in *Gray v. Bond*, 2 Brod. & B. 667, where a lord of a manor from time immemorial had been seised of a several fishery in the river Derwent, a river in which the tide ebbed and flowed, and the lessees of the fishery had publicly landed their nets on the shore of it for more than twenty years, and had at various times dressed and improved the landing, it was held to have been properly left to the jury to presume a grant of right of landing to the lessees of the fishery by some owner of the shore. Such, too, were the cases of *Worrall v. Rhoads*, 2 Whart. 427 [30 Am. Dec. 274]; *Wheatley v. Chrisman*, 24 Pa. St. 298 [64 Am. Dec. 657]; and *Jones v. Crow*, 32 Id. 398. So were *Garrett v. Jackson*, 20 Id. 331, and *Reimer v. Stuber*, 20 Id. 458 [59 Am. Dec. 744]. The excepted case was *Trauger v. Sassaman*, 14 Id. 514. It was there held that the undisturbed and exclusive use by two congregations of a piece of ground adjoining a church, in which they both worshiped, for fastening therein horses and carriages during divine service, for about seventy years, will give title thereto by the statute of limitations. "There is not a *scintilla* of testimony," said Mr. Justice Coulter, "that anybody else claimed possession in all that lapse of time, or had any kind of possession or occupancy, or claimed to have it, in opposition to them." That, then, was not the case of a mere easement, but an interest in land.

Nor is it a universal principle, without exception, that whatever incorporeal hereditament may be granted may also be acquired by long and uninterrupted user. On the contrary, it is well settled that a right or privilege claimed by prescription must be such as must reasonably be presumed to have been granted. An owner of land who is *compos mentis* may grant an easement on or over it, which will in effect destroy the usufruct of his property; but no length of time can raise the presumption of such a grant. "No man," says Mr.

Phear, "will be presumed to have made the grant of an easement, such that its exercise may be large enough to destroy the usufruct of his property": Phear on Rights of Water, 81. Our departure from the common law, which allows of the prescription of a grant of an easement of light and air through ancient windows, might well have been put upon this principle, in view of our special circumstances, so different from those of the old country: *Hoy v. Sterrett*, 2 Watts, 331 [27 Am. Dec. 813]; *Wheatley v. Baugh*, 25 Pa. St. 532 [64 Am. Dec. 721]; *Hazlett v. Powell*, 30 Id. 296; *Haverstick v. Sipe*, 33 Id. 368. A prescriptive claim of common without stint, as annexed to a messuage without land, has been held bad: *Benson v. Chester*, 8 Term Rep. 396. So also a plea that the occupiers of a brick-kiln for thirty years had enjoyed, as of right, the privilege to dig, take, and carry away from the plaintiff's close as much clay as was at any time required by them for making bricks at the kiln, was overruled, because there could arise no reasonable presumption of such a grant: *Clayton v. Corby*, 5 Q. B. 415. In like manner, and on the same principle, in *Post v. Pearsall*, 22 Wend. 425, it was decided that the public cannot acquire a right, by an uninterrupted use of twenty years with the knowledge of the owner, of his soil on the bank of a navigable river as a landing and place of deposit for property on its transit to and from vessels navigating such water.

On the whole, we are of the opinion that the evidence given in behalf of the plaintiff in the court below did not present such a case as ought to have been submitted to a jury. The extent of the fishing-place claimed was a mile on the river, a very unusual length, as I have reason to believe, if not entirely unprecedented. There was no fixed point at which it was alleged that the seine was cast in and drawn out. The right claimed was to select any point in this unusually long distance. The whole shore was asserted to be one fishing-place. There was ample space for three or four. It is true that in swift water above tide the sweep of the net is much more rapid and shorter than in tide-water, where the current is sluggish. The evidence below in regard to the casting-in and hauling-out place was very vague and indefinite. For all that appears, one year it might have been at one place, the next at another, allowing, as is the case in most fisheries, a different place for high and low water. Even if the proof had been distinct and clear that every year for twenty-one consecutive years during

the six weeks that the season for shad-fishing usually lasts, somebody, lessee or other person under this claim of right, had fished along the shore from Hart's wharf to the mouth of Darby Creek, which, however, was far from being the case, it would have been insufficient to establish the title set up by the plaintiff. We must dismiss from our consideration the fact that evidence was given of a devise of a fishing-place by a former owner of the shore, under which the plaintiff attempted to deduce title. He failed, in the opinion of the learned judge below. Whether he was right or wrong in that opinion is a question which we have not before us on this writ of error. It ought to have no influence in determining the other important and distinct question, whether the right to a fishing-place in *alieno solo* on the bank of a navigable river can be established by showing that those under whom the plaintiff claims by grant, devise, or inheritance, not of any dominant tenement, but of a separate hereditament in gross, have for twenty-one years and upwards, once a year, fished at that place. If this can be done, it would apply as well when there was no evidence of there ever having been such a grant or devise as when there was. It would be of very dangerous consequence, as we apprehend, to all riparian proprietors upon navigable rivers, if by this sort of parol evidence of user they could practically be deprived of their frontage by being cut off from all the advantages of it for wharves, landings, and other improvements,—in short, lose the entire usufruct of their property in what may be regarded as its most valuable quality.

Judgment reversed, and a *venire facias de novo* awarded.

THE PRINCIPAL CASE came before the supreme court previously in *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 29; and afterwards in *Carter v. Tinicum Fishing Co.*, 77 Id. 310, and *Tinicum Fishing Co. v. Carter*, 90 Id. 85. Altogether, it was appealed three times by the defendant and once by the plaintiff, presenting some different questions each time, and being reversed each time. It is cited in *Cobb v. Bennett*, 75 Id. 309, as discussing the subject of fisheries at great length, and with much research; and also in *Myers v. City of St. Louis*, 8 Mo. App. 274, to the point that at the common law, and under the common-law and civil-law doctrines, as modified by the system of surveys established after the acquisition of the Northwest territory, every person owning on the banks of the Mississippi River has a right that it should flow *ubi currere solebat*.

PRESCRIPTION RESTS UPON PRESUMPTION OF GRANT: *French v. Maratia*, 57 Am. Dec. 294, and note; *Reimer v. Stuber*, 59 Id. 744, and note; *Powell v. Bagg*, 69 Id. 262; *Bow v. Allenstown*, 69 Id. 489; *Hicatt v. Morris*, 78 Id. 280; *Klein v. Gehring*, 78 Id. 565; *Webber v. Chapman*, 80 Id. 111; *Rhodes v. Whitehead*, 84 Id. 631.

SEVERAL AND EXCLUSIVE FISHERY DOES NOT, IN GENERAL, EXIST IN NAVIGABLE WATERS: *Carson v. Blazer*, 4 Am. Dec. 463; *Browne v. Kennedy*, 9 Id. 503; *Commonwealth v. Chapin*, 16 Id. 386; *Lansing v. Smith*, 21 Id. 89; *Delaware etc. R. R. v. Stamp*, 29 Id. 561; *Parker v. Cutler Milldam Co.*, 37 Id. 56; *Collins v. Benbury*, 38 Id. 722; S. C., 42 Id. 155; *McCrillough v. Wall*, 53 Id. 715; *Weston v. Sampson*, 54 Id. 784; *Moulton v. Libbey*, 59 Id. 57; compare *Rogers v. Jones*, 19 Id. 493; but the right to take fish in un-navigable streams belongs to the riparian proprietors, and may be several and exclusive: *Hooker v. Cummings*, 11 Id. 249; *Waters v. Lilley*, 16 Id. 333; *Commonwealth v. Chapin*, 16 Id. 386; *Beckman v. Kreamer*, 92 Id. 146.

SEVERAL AND EXCLUSIVE FISHERY IN NAVIGABLE WATERS, WHETHER MAY BE GRANTED BY LEGISLATURE: See *Phipps v. State*, 85 Am. Dec. 654.

RIGHT TO TAKE FISH IS NOT EASEMENT PROPER, BUT PROFIT A PRENDRE: *Cobb v. Davenport*, 97 Am. Dec. 718.

PROFIT A PRENDRE MUST BE PRESCRIBED IN QUE ESTATE: See *Waters v. Lilley*, 16 Am. Dec. 333; *Littlefield v. Maxwell*, 50 Id. 653.

EASEMENT IN GROSS IS PERSONAL, AND CANNOT BE ASSIGNED: *Alley v. Carleton*, 94 Am. Dec. 260.

KNOWLEDGE AND ACQUISITION OF OWNER OF LAND REQUIRED IN CASES OF PRESCRIPTION: See *Warner v. President etc. of Town of Jacksonville*, 58 Am. Dec. 610; *Powell v. Bagby*, 69 Id. 262; *Klein v. Gehring*, 78 Id. 565; *Webber v. Chapman*, 80 Id. 111.

CRAWFORD'S APPEAL.

[61 PENNSYLVANIA STATE, 52.]

CONTRACT BY PAROL WHICH INCLUDES AN UNSEALED WRITING NEEDS A CONSIDERATION TO SUPPORT IT.

WHEN GIFT IS NOT EXECUTED BY DELIVERY, but the determining act remains *in fieri*, the law gives no force to the mere intention to do it.

WHERE HUSBAND HAS MONEY OF WIFE which he does not pay to her, but which he credited on his books as actually received by her, and carried it into an account of moneys admitted to be hers, mingled it with it, credited interest upon it, and finally consolidated the account and added interest on the total sum, — this constitutes an executed gift, followed by an express trust, in the form of an account for it and its accrued interest, which cannot be impeached by mere volunteers.

TRUST DIFFERS ESSENTIALLY FROM CONTRACT, and will be enforced when the latter cannot.

THE opinion states the facts.

Townsend and Strong, for the appellant.

J. B. Collahan, for the appellees.

By Court, AGNEW, J. The title of the appellant to the three thousand dollars credited to her on her husband's books cannot be supported as a debt. A contract by parol which includes an unsealed writing needs a consideration to support it: *Kennedy's Ex'rs v. Ware*. 1 Pa. St. 450; *Whitehill v. Wil-*

son, 3 Pa. 418; *Campbell's Estate*, 7 Pa. St. 100 [47 Am. Dec. 503]. Nor could it be supported as an ordinary gift between strangers, taking into connection with the books the explanatory proof of the facts. It would have no greater effect than an envelope inclosing securities for debt, indorsed "for Rebecca Gore," found among the papers of a decedent: *Plumstead's Appeal*, 4 Serg. & R. 545. Or a direction to burn certain notes in favor of a nephew, without delivering them: *Campbell's Estate*, *supra*. Or the indorsement of a single bill that it should be of no effect at the decease of the owner, unsustained by a consideration: *Albert v. Zeigler*, 29 Pa. St. 50; *Raymond v. Middleton*, 29 Id. 534. Where the gift is not executed by delivery, but the determining act remains *in fieri*, the law gives no force to the mere intention to do it. But in this case are not the facts sufficient to show an executed intention followed by a trust? The transaction was between husband and wife, and therefore influenced by their peculiar relation, with no one now to contest it but mere volunteers, who stand equally affected by the act as the husband himself, under whom they claim to take. The entry of May 9, 1864, was a credit in the cash-book of the husband of three thousand dollars, cash received. The receipt thus entered is an acknowledgment of cash paid, as much as a receipt in form to Mrs. Crawford would be. It imports a past act, not a future promise. This made out a *prima facie* case, and so conscious of it were the opposite parties that to escape its effect they called her as a witness. She stated that her husband had purchased a house, and told her he would have the deed made to her, but she replied that she did not want the trouble of a house. Some time afterward he came in and said to her: "I have added three thousand dollars to your little money, and after a while I am going to give you three thousand dollars more." He did not hand her the money then, or at any time. But we find the money credited as if actually received, carried into an account of moneys admitted to belong to her, mingled with it, interest credited upon it, finally consolidated in the account, and interest added on the total sum.

This is certainly ample evidence of an executed gift followed by an express trust in the form of an account for it, and its accrued interest, remaining unrevoked or undenied by the decedent up to the time of his death. It cannot be doubted, then, that Crawford intended to fasten upon himself and his estate an admitted gift, and to become a trustee of the fund.

Who are they that say his admission and declared trust shall be avoided because there was no formal handing over and handing back of the money? Mere volunteers,—persons who are bound by his acts? What greater right have they to impeach his solemn admission of the receipt, and the acknowledged trust exhibited by his book, than a voluntary assignee has to deny the act of his assignor? In *Rogers v. Fales*, 5 Pa. St. 158, it was held that a voluntary assignee does not represent creditors, and cannot question the conduct of his principal in permitting his wife to appropriate articles of ornament and furniture. Then it is clear that the burden of proof is thrown on these volunteers to lift the trust from the estate; and how do they propose to prove this? Not by disproof of the full intention to give, or of the intention to treat the gift as executed, or the intention to hold as trustee of the fund; not by disproof of the entries on the books, or of a counter-charge, or a withdrawal of the credit, or, indeed, of anything to prove an alteration of the mind of the husband,—but merely to prove there was no formal passing of the money between them.

But this was a useless ceremony between husband and wife, where there is a clear executed intention to become the trustee of the fund for her benefit. In order to make such a formality effective, a witness must be called to see him, hand the money to her, and straightway receive it back. But of what greater efficacy would this be than the husband's own admission in his book, and his express direction to his book-keeper? The difference is clearly one of the merest form, and not of substance. *Lex non præcipit inutilia; quia inutilis labor stultus.* Of what possible use can it be to go through a mere ceremony, where the evident intent is to assume immediate possession as a trustee? I cannot see that the facts of this transaction have less force, when properly viewed, than those in *Herr's Appeal*, 5 Watts & S. 494. There the subject of the gift was money, unaccompanied with any declaration amounting to a trust. There money was kept in a lower or false bottom of a trunk to which the husband had access at all times, and to which he often went without the presence of his wife. The money continued just as much within his actual dominion as if it had been kept by him in another place. There was no evidence of actual delivery or passing over of the money, as the gift was inferred from the declarations of the husband that the money was his wife's, his keeping it in the lower division

of the trunk, apart from his other money, his adding to it from time to time, and taking none away, and his wife's carrying the keys. There was no formal delivery, no counting of the money, no specific sum stated by him,—indeed, the sum was not known, except as a probable or supposed amount,—so that the case in fact rested directly on the declarations of the husband, and the setting aside that much money apart from his own; while his actual access and control over it, and the legal unity of person, made the possession as much his own as his wife's. On this point, see *Larkin v. Mullin*, 49 Pa. St. 34.

Now, in the case before us, there was a most distinct setting apart to the wife of a specific sum, stated to his wife as actually done, or "added," as he expressed it, declared expressly to his book-keeper, its receipt solemnly acknowledged by written entry in his book, mingled with her undoubted funds in the account, and increased by accumulated interest on the total sum, the whole constituting an acknowledged gift and a superadded trust. *Flower's Case*, Noy, 67, is also authority for dispensing with a mere formality where the intent of the party is clearly executed. Thus a nephew returned to his uncle one hundred pounds, in a bag, which he had borrowed, and laid it on the table before him. The uncle said: "I will not have it; take it, you, and carry it home with you." This was held to be a good gift by parol, and consequently a good payment of the debt. It is evidently founded on the maxim stated in Noy, page 91: "The intent of the party shall be taken according to law." Without a payment of the debt, the gift would be fruitless. Here the husband treated the money as passed between him and his wife, as the uncle did the bag of money, and as Herr did the money in the trunk, though in fact it had not formally passed; and he then declared a trust of it by entering it on his book to his wife's credit in an account of other moneys he had of hers. Thenceforth it became a trust, and must be so treated. It is this trust which these volunteers must disprove, and not the want of a mere formality dispensed with by the parties in its origin. Herein is the distinction overlooked by the learned auditor whose report the court confirmed. It is not the case of a promise, or a chose in action, but of an acknowledged receipt and a trust.

It is admitted that a bond or specialty given, which is but a chose in action, would be recoverable, a consideration being imported by the seal. And yet what is this but a difference in form, a merest shadow, a thing made by the flourish of a

pen, where a consideration is often actually wanting? Why, in such a clear case as this, shall not the transaction follow the form of the instrument which denotes an act done, not a contract to do it? The intention to be bound for the receipt and care of the money is not less evident than if the instrument were a bond. That a trust differs essentially from a contract, and will be enforced when the latter cannot, is established by authority: *Jones v. Lock*, L. R. 1 Ch. 25; *Ex parte Pye*, 18 Ves. 140; *Vance v. Vance*, 1 Beav. 605.

We are of opinion, therefore, that the court below erred in confirming the report of the auditor rejecting the claim of Mrs. Crawford to the sum of three thousand dollars, and its interest credited on the book of the decedent.

The decree of the orphans' court to this extent is reversed, and the record ordered to be remitted, with instruction to allow to the appellant the said sum and interest, and to correct the distribution accordingly; and the costs are ordered to be paid out of the estate.

DELIVERY OF GIFT IS ESSENTIAL TO ITS DELIVERY: *McWillis v. Van Vactor*, 72 Am. Dec. 127, and note 137; *Allen v. Cowan*, 80 Id. 319. Mere intention will be unavailing without delivery: *Peck v. Brummagin*, 89 Id. 195.

PRESENT GIFT FOR PRESENT PURPOSE amounts to an executed trust for such purpose: *City of Philadelphia v. Girard's Heirs*, 84 Am. Dec. 470.

WHEN DETERMINING ACT REMAINS IN FIERI, the intention does not execute the gift: *Trough's Estate*, 75 Pa. St. 118, citing the principal case.

TRUST MUST HAVE CONSIDERATION to support it: *Trough's Estate*, 75 Pa. St. 118, citing the principal case.

JOHNSON v. BRUNER.

[61 PENNSYLVANIA STATE, 58.]

WHEN INJURY HAPPENS TO SERVANT in the course of his employment, the master is liable if it was occasioned by his negligence.

IF INJURY TO SERVANT IS RESULT OF HAZARDOUS EMPLOYMENT, without fault on the part of the master, he is not liable; but if his negligence was the direct and proximate cause of the injury, he is liable, whether the employment was hazardous or not.

WHEN SERVANT'S MISCONDUCT CONTRIBUTES to his injury, or when it arises from the omission of a duty defined or prescribed by law, negligence is a question of law, and not of fact for the jury.

NEGLECT IS GENERALLY QUESTION OF FACT FOR JURY. This is always so when there is any doubt as to the facts, or the inferences to be drawn from them.

WHEN FACTS PRESENT CLEAR CASE OF NEGLIGENCE, it is a question of law.

THE opinion states the facts.

T. K. Finletter, for the plaintiffs in error.

W. L. Hirst, for the defendant in error.

By Court, WILLIAMS, J. This was an action brought, under the statute, by the parents of a minor son, to recover damages for his death, alleged to have been occasioned by the negligence of the defendant. The judge before whom the cause was tried ordered a judgment of nonsuit to be entered, and the court in bank refused to set it aside. As no opinion was delivered in the case, we are left to conjecture the ground on which the nonsuit was sustained. But it must have been either because, in the opinion of the court, the defendant was not shown to have been guilty of any negligence, or if he was, that the minor's own negligence contributed to his death. Can the judgment of nonsuit, then, be sustained on either of these grounds?

It is well settled that where an injury happens to a servant in the course of his employment, the master is responsible if it was occasioned by his negligence. If it was the result of the hazardous nature of the employment, without any fault on the part of the master, he is not liable; but if his negligence was the direct and proximate cause of the injury, he is responsible, whether the employment was hazardous or not. These principles are so plain and familiar that they require no argument or authority for their support. Was there, then, any evidence tending to show that the defendant was guilty of negligence? The plaintiff's son, a lad of about fourteen years of age, was employed by the defendant in his carding and spinning room in the fourth story of the building where he carried on the business of manufacturing woolen goods. He was working with the stripper at one of the cards, and while carrying an armful of waste from the carding-machine into the waste-room, he fell through an open trap-door or hatchway, a distance of sixty feet, to the bottom of the building, and was killed. The hatchway was in the carding and spinning room, immediately in front, and within six inches of the doorway leading to the waste-room. It was about five feet square, and in going in and out of the room the employees had to pass over it, — there was no other passage. There was no railing or protection of any kind around the hatchway, the trap-doors of which were ordinarily kept closed, on a level

with the floor, except when it was in use. All the witnesses describe it as dangerous, and from its location, size, and proximity to the door, it could not have been otherwise. Was it not, then, the duty of the defendant to have had a railing or other protection around it? and was he guilty of no negligence in permitting it to remain open,—without any notice or warning,—to the hazard of the lives and limbs of his employees? Had the court a right to assume that he was under no obligation to put any guard or barrier around it, or to give any notice or warning when it was open for use? If the defendant was not absolutely bound to put up a railing around the hatchway, was it not his duty to have a watchman stationed there to guard it whenever it was open, and give notice of the danger? And was it not negligence to intrust the duty of opening and using it to a lad of so little experience and discretion as the picker-boy? No attempt was made on the argument to show that the defendant was under no obligation to guard the hatchway, nor was it alleged that the death of the minor was not occasioned in part by his negligence. If the nonsuit was granted on the ground that there was no evidence of negligence on the part of the defendant, it was clearly erroneous. Was there, then, such evidence of negligence on the part of the deceased as to justify the court in withdrawing the case from the jury, and determining the question as a matter of law? If it had been shown that his death resulted from the hazardous nature of his employment, then the court would have been justified in withholding the case from the jury; but it is not pretended that this was the cause of his death. He was not working at the hatchway at the time of the accident. If he had been lowering the waste, and by some mishap had fallen through the hatchway, then his death might be regarded as an accident, or result of the dangerous character of the business in which he was engaged, and as one of the risks which he or his parents assumed when he entered into the service of the defendant.

Again: if it had been shown that his misconduct contributed to his death, or that it arose from the omission of a duty defined or prescribed by law, then there would have been no question for the jury. But the evidence did not show that he was guilty of the omission of any defined duty, or of any misconduct whatever. On the contrary, he was in the discharge of his duty, and just where that required him to be, at the time he was killed. If there was anything in his conduct to

prevent a recovery, it must have been negligence. This was his only fault, and negligence is ordinarily a question for the jury. It is always a question for their determination when there is any doubt as to the facts, or the inferences to be drawn from them. But the evidence may show a case of such clear negligence arising from obvious disregard of duty and safety, as to make it incumbent on the court to determine it as a question of law: *Pittsburg and Connellsville Railroad Company v. McClurg*, 56 Pa. St. 294. Was this, then, such a case? It was if, as suggested on the argument, the deceased, in the broad daylight of a summer afternoon, with his eyes open, deliberately walked into an open hatch, and fell. But this leaves out of view, and wholly ignores, all the surrounding and attendant circumstances. It is true that the accident occurred in the broad daylight of a summer afternoon, but there is nothing to warrant the inference that the deceased saw the open hatchway. It is evident that he did not see it; and the only question is, whether his failure to observe it arose from negligence or carelessness. What, then, are the facts as shown by the evidence? The card behind which he worked was about twelve feet from the hatchway. The wool-box at the side of the room was seven feet high at the back and three at the front, and extended from the hatch to within two feet of the card. When the boy was at work, it was impossible for him to see the hatch,—he could see it only when he came around the corner of the wool-box. According to the testimony of the stripper with whom he worked: “He had swept around the card, and gathered up an armful of waste; he took it across the trap-door into the waste-room; came back for more; gathered up another armful and started off for the waste-room, and fell down the trap; when he crossed the trap and came back, it was as speedily done as he could walk back and pick up the armful of waste; scarcely no time elapsed from the time he crossed the trap-door until he fell.” While he was gathering up the last armful of waste, the picker-boy opened the hatchway. He says: “The accident happened about half-past five o’clock in the afternoon; I was tying up waste to take down-stairs—down the hatchway; Johnson brought an armful of the waste to the waste-room; he went back to take another, and then he fell. I was in the picker-room when he fell; I had opened the west door of the hatchway; the east door was down; I had drawn a bag of waste and left it in the door, and went back for another; it

was then he fell; I gave no notice that I had opened the trap-door; there was no one helping me to lower the waste; on other occasions there was always some one helping me; . . . the trap-door is the same in all the stories; . . . the business could not be carried on without the hatchway; there was no particular time fixed for lowering the waste down the hatchway; I always did it between five and six o'clock; sometimes at five o'clock, sometimes at half-past five o'clock, and sometimes later, just as I had the time." All the machinery was in operation, except the card at which the deceased worked.

Was this, then, such a clear case of negligence as to justify the court in declaring it such as a matter of law? Was negligence the only and necessary inference from the facts? If no other possible inference can be drawn from them, it was the duty of the court to declare, as a matter of law, that the deceased was guilty of negligence. But if any other inference could be drawn from them, depending on the view which might be taken of them, then the evidence ought to have been submitted to the jury. The deceased, as we have seen, immediately before the accident, had passed over the trap-doors, when they were closed, in safety. Had he any reason for supposing that they had been opened while he was gathering up an armful of waste? And if not, was it negligence on his part if he did not stop and look before he came to the hatchway? Would he readily have seen the open hatchway with an armful of waste? Would it not depend upon the bulk and the manner in which he was carrying it? Might it not have been so held that the open trap-door did not come within the line of his vision? And if so, was there any negligence in his not seeing that it was open? If these, and other questions which might be asked, are susceptible of more than one answer, according to the view taken of the facts, then the case ought to have been submitted to the jury. Whenever there is any doubt as to the facts, it is the province of the jury to determine, not only what they are, but what are the proper inferences to be drawn from them. Without intending to intimate what the finding of the jury should be, we are clearly of the opinion that the court erred in withholding the case from them, and ordering a judgment of nonsuit.

Judgment reversed, and a *procedendo* awarded.

WHERE EVIDENCE IS CONFLICTING, QUESTION OF NEGLIGENCE is for the jury: *Louisville etc. R. R. Co. v. Collins*, 87 Am. Dec. 486, note 492; *Simmons v. New Bedford etc. Co.*, 93 Id. 99, note 106.

WHEN FACTS ARE CLEAR AND SATISFACTORY, question of negligence is one of law: *Pennsylvania R. R. Co. v. Ogier*, 78 Am. Dec. 322; *Todd v. Old Colony etc. R. R. Co.*, 80 Id. 53.

AS GENERAL RULE, QUESTION OF NEGLIGENCE must be submitted to the jury, and it should be, where there is any substantial doubt as to the facts, or as to the inferences to be drawn from them: *Crissey v. Hestonville etc. R. R. Co.*, 75 Pa. St. 86; *Goshoon v. Smith*, 92 Id. 438; *McKee v. Bidwell*, 74 Id. 223, all citing the principal case.

NEGLECT IS QUESTION FOR JURY, when the measure of duty is ordinary and reasonable care, or when the degree of care shifts with circumstances; but when the measure of duty is defined by law, and is the same under all events, its omission is negligence, to be declared by the court; or where there is such disregard of duty as amounts to misconduct, the court may declare it negligence: *West Chester etc. R. R. Co. v. McElwee*, 67 Pa. St. 315, citing the principal case.

SHARPE v. BELLIS.

[61 PENNSYLVANIA STATE, 69.]

NOTE IS MATERIALLY ALTERED, AND IS THEREFORE NOT ADMISSIBLE in an action against the indorser, where the evidence already showed that the treasurer of a corporation drew the note in blank, obtained the indorsement of the president thereon with the affix "Pres't," he refusing to indorse it as an individual, filled up the note with the president's name as payee, and the amount, erased the word "Pres't" from the indorsement, and then gave it to the holders, who took it for a precedent debt due them from the corporation, and with knowledge that the indorser was president thereof.

NOTE IS THAT OF CORPORATION, AND NOT OF INDIVIDUAL, where it was made by one who was the treasurer of the corporation to the order of the payee, personally, without any designation of the corporation of which he was president, but was indorsed by him with the affix "Pres't," if the holders, who took it thus indorsed, knew that the indorser was the president, although, it seems, the indorser would have been individually liable if the holders were strangers to this fact.

FOREIGN attachment. The plaintiffs, Sharpe, Weiss, & Co., had declared against the defendant, G. J. Bellis, as indorser of a certain note drawn to his order by one G. S. Burroughs. The plaintiffs gave in evidence the deposition of one Martindale, from which it appeared that Martindale, who was a stockholder and salesman of the Port Richmond Pottery Company, had purchased coal, which was the consideration of the note in question, from the plaintiffs. The plaintiffs had asked payment for the coal, and Martindale and Burroughs, the treasurer of the company, endeavored to get the plaintiffs to take

the company's note therefor. This the plaintiffs declined to do, but agreed to take the individual note of Bellis, the president of the company. Bellis, when applied to by Burroughs to give his individual note, positively refused to do so, but agreed to indorse the note as president, and wrote on the back of a blank note "G. S. Bellis, Pres't." Burroughs took the note, filled it up with Bellis's name as payee, and with the amount, and scratched off the word "Pres't" from the indorsement with a penknife, without authority from Bellis, and Martindale then delivered the note to the plaintiffs. Newton, the plaintiffs' general agent, testified that the plaintiffs did not know of the erasure until after the note had been protested. The coal was charged to the company, and the receipt given was "by note when paid." The plaintiffs then offered the note, which was as follows, in evidence:—

"\$2,039.06.

PHILADELPHIA, PA., March 19, 1867.

"Sixty days after date, I promise to pay to the order of G. S. Bellis, two thousand and thirty-nine and six one-hundredths dollars, at the Kensington National Bank, Phila., Pa. Value received.

(Signed)

"G. S. BURROUGHS, Treasurer.

Indorsed: "G. S. BELLIS."

The court rejected the evidence, and ordered a nonsuit. The plaintiffs assigned error.

A. Hart and F. B. Gowen, for the plaintiffs in error.

S. Dickson, for the defendant in error.

By Court, THOMPSON, C. J. If Sharpe, Weiss, & Co. had been entire strangers to the defendant, Bellis, and to the fact of his connection with the Port Richmond Pottery Company, as president, it could hardly be contended, we think, that the abbreviation "Pres't," after his name, could, in the absence of anything on the face of the note to indicate his possession of it in a representative character, be regarded as a restrictive indorsement.

The promise contained in it to him as payee was personal, and there was no designation of a company of which he was president, to which the affix to his name would apply. No company was disclosed as the principal intended to be bound. In such a case, the rule seems to be well settled that when an agent does not mean to be personally bound by a writing, he must disclose the name of a principal whom he intends to

bind: 1 Parsons on Contracts, 95; 1 Am. Lead. Cas. 602, in note; *De Witt v. Walton*, 5 N. Y. 571; *Spencer v. Field*, 16 Wend. 87. There can be no difference in principle between simply adding the word "agent" when no principal is disclosed, and the word "Pres't" when no corporation or company is disclosed.

On this note so indorsed, without extrinsic proof of knowledge on part of the plaintiffs, this indorsement, we think, would have imported a legal, personal obligation, and in this aspect the erasure of the affix would be an immaterial alteration, which it is the rule now to hold as not affecting the instrument: *Tassey v. Church*, 4 Watts & S. 346 [39 Am. Dec. 65], and subsequent cases, not important to cite.

If, however, the plaintiffs did not know the official relation of the defendant to the company, the erasure was material. It changed the nature of the defendant's obligation from an official representative act to a personal undertaking. It was then not admissible in evidence, provided that fact sufficiently appeared before its offer; that it did in the proof made by the plaintiffs is clear beyond controversy. The claim for which the note was given was for coal sold to the company by the plaintiffs. They applied to the company for payment and the treasurer, Burroughs, and the witness, Martindale, a stockholder and salesman of the company, endeavored to get the plaintiffs to agree to take a company note for their debt. This they declined, but agreed to take Mr. Bellis's note. Mr. Bellis, when applied to by the treasurer of his company to give his individual note for the demand, positively refused, but indorsed a blank note, signing as president. This, Burroughs filled up with his name as payee, and erased very skillfully the word "Pres't" from his signature as indorser, and passed the note over to the plaintiffs; thus committing a gross fraud on him, as well as practicing a great deception on the plaintiffs. No other inference could arise from the testimony than that the plaintiffs knew that Bellis was the president of the pottery company at the time they received his note. They were the creditors of his company, and had presented their claim against the company, and pressed it for payment. This was the proof. The erasure was also clearly proved by the plaintiffs before the note was offered. They then stood in the position of a party offering in evidence a note with a material alteration fraudulently made and proved, without being holders for value, the note having been given for a precedent debt, and without the surrender of any

security and upon a receipt given on the claim "by note when paid." The note was therefore not admissible on the ground of the fraudulent alteration. Nor would it have sustained the plaintiffs' *narr.*, taking it as it was indorsed; for if the plaintiffs knew, as we have shown they must have known, that he was the president of the pottery company, when he indorsed as president, then it was the note of the company, and not his individual note; and as the company was not sued, it was not evidence in the case on trial. In both views the note, under the plaintiffs' proof, was inadmissible, and the learned judge committed no error in rejecting it. As there was no other ground of recovery against the defendant, the nonsuit was properly ordered.

Judgment affirmed.

ALTERATION OF NEGOTIABLE INSTRUMENT, WHEN MATERIAL: See *Reed v. Roark*, 65 Am. Dec. 127, and note; *Miller v. Reed*, 67 Id. 459; *White v. Hase*, 70 Id. 548; *Holland v. Hatch*, 71 Id. 363; *Sturges v. Williams*, 75 Id. 473; *Fay v. Smith*, 79 Id. 752; *Struthers v. Kendall*, 80 Id. 610; *Brownell v. Winnie*, 86 Id. 314; *Hall's Adm'x v. McHenry*, 87 Id. 451; *Commonwealth v. Emsgrant etc. Savings Bank*, 93 Id. 126; *Bridges v. Winters*, 97 Id. 443.

MATERIAL ALTERATION OF NEGOTIABLE INSTRUMENT AVOIDS IT: *Reed v. Roark*, 65 Am. Dec. 127, and note; *Miller v. Reed*, 67 Id. 459; *White v. Hase*, 70 Id. 548; *Holland v. Hatch*, 71 Id. 363; note to *Ames v. Colburn*, 71 Id. 724; *Trigg v. Taylor*, 72 Id. 263; *Sturges v. Williams*, 75 Id. 473; *Williamson v. Smith*, 78 Id. 478; *Fay v. Smith*, 79 Id. 752; *Vogle v. Ripper*, 85 Id. 298; *Brownell v. Winnie*, 86 Id. 314; *Hall's Adm'x v. McHenry*, 87 Id. 451; *Leone v. Schenck*, 90 Id. 631; *Bellnap v. National Bank*, 97 Id. 105.

NEGOTIABLE PAPER EXECUTED, INDORSED, ETC., BY "AGENT," "CASHIER," "PRESIDENT," "TRUSTEE," ETC., EFFECT OF: See *Johnson v. Catlin*, 62 Am. Dec. 622, and note; *Pierce v. Robie*, 63 Id. 614; *Traynham v. Jackson*, 65 Id. 152; *Bank of British North America v. Hooper*, 66 Id. 390; note to *Eastern R. R. v. Benedict*, 66 Id. 389; *Conner v. Clark*, 73 Id. 529, and note; *Williams v. Robbins*, 77 Id. 396; *Slawson v. Loring*, 81 Id. 750; *Hall v. Orandall*, 89 Id. 64; *Bickford v. First National Bank*, 89 Id. 436; *Collins v. Buckeye State Ins. Co.*, 93 Id. 612; *Pease v. Pease*, 95 Id. 225.

HELME v. PHILADELPHIA LIFE INSURANCE CO.

[61 PENNSYLVANIA STATE, 107.]

CONTRACT IS GENERALLY LAW OF TRANSACTION IN WHICH IT EXISTS, and is not to be affected by anything but its terms, yet in many cases its execution may be curtailed by usage or custom.

GENERAL RULE IS, THAT CUSTOM MAY NOT BE HEARD TO AFFECT TERMS OF STATUTE, nor a contract, to the extent of enlarging or abridging the force of it, yet it may interpret either.

IN ACTION ON POLICY OF LIFE INSURANCE, IT IS COMPETENT FOR PLAINTIFF TO PROVE a custom among life insurance companies to allow thirty

days' grace for payment of premiums due, if the insured is in usual health, even where a clause of forfeiture for non-payment on the day exists.

WHERE PRACTICE OF INSURANCE COMPANY IS TO GIVE NOTICE OF ACCRUING PREMIUMS, and fails to do so on the occasion for which a policy was forfeited, or so deals with the insured as to induce a belief that the clause of forfeiture will not be insisted on, etc., thus putting the insured off his guard, the company cannot take advantage of the default which it encouraged.

IT IS NOT TO BE DOUBTED THAT INSURANCE COMPANY MAY WAIVE defective compliance with the rules of insurance.

FORFEITURES ARE ODIOS IN LAW, AND ARE ENFORCED ONLY where there is the clearest evidence that that was what was meant by the stipulations of the parties. There must be no cast of management or trickery to entrap a party into a forfeiture.

ACTION of *assumpsit* to recover premiums paid on a life insurance policy, on the ground that the policy had been wrongfully forfeited. The declaration averred a waiver of the clause of forfeiture, and alleged as the breach the refusal to receive premiums, and declaring the policy forfeited. The clause of forfeiture provided in substance that in case of non-payment of premiums at the day, the policy should cease and determine, and all previous payments should be forfeited to the company. On the trial, the plaintiff offered to prove a custom among insurance companies to receive premiums, if tendered at any time within thirty days after they fell due, provided the insured was in usual health, and that such was the custom among companies issuing policies stipulating that non-payment of premiums at the day should work a forfeiture. The offer was rejected, and the court directed a nonsuit. The plaintiff assigned error.

R. P. White and G. H. Earle, for the plaintiff in error.

C. Gibbons, for the defendant in error.

By Court, THOMPSON, C. J. The plaintiff below offered on the trial to prove a custom among life insurance companies to allow thirty days' grace for payment of premiums due, even where a clause of forfeiture for non-payment on the day exists. The rejection of the offer by the court forms the first bill of exceptions and assignment error to be considered in this case.

It might have been a difficult thing to prove such a custom, but that was not a good ground on which to refuse the offer. It was the plaintiff's right to prove it if she could; and we are to take it, for the purposes of this investigation, that she could

have proved it. Would it have been efficient proof for any purpose, had it been admitted? We think it would, although generally a contract is the law of the transaction in which it exists, and is not to be affected by anything but its terms; that is to say, it cannot be abridged or enlarged in itself by anything else; yet there are many cases in which its execution is materially curtailed by usage or custom. A familiar instance are days of grace on commercial paper. By a custom, grown into law, it is not due until the expiration of three days after it purports to be; or rather, the remedy is suspended against parties for that period. So in agriculture; although the lease may fix the duration of the term, and when it is to end, yet the tenant, by custom, has rights in the premises after it is ended to harvest and carry away his share of what the custom calls the way-going crop: *Stultz v. Dickey*, 5 Binn. 295 [6 Am. Dec. 411]; *Biggs v. Brown*, 2 Serg. & R. 14; *Phile v. Anna*, 1 Dall. 201; 1 Smith's Lead. Cas., 6th ed., 470. This custom seems to do more than curtail the remedy; it, in fact, enlarges the contract. But no custom is more perfectly established, or more thoroughly stands on a solid foundation as law. There are customs which interpret marine contracts to the extent of apparent changes in them. In Peake's *Nisi Prius*, 43, in the case of *Chaurand v. Augustein*, it was shown that, by custom, a stipulation in a policy of insurance that a vessel was to sail in October meant that she was to sail between the 25th of the month and the 1st or 2d of November. While a custom, as a general rule, may not be heard to affect the terms of a statute, nor a contract, to the extent of enlarging or abridging the force of it, yet it may interpret either: *Rapp v. Palmer*, 3 Watts, 178.

The offer in this case was to curtail the generality of the clause of forfeiture in the policy in case of non-payment of the premiums at the day, and to show that a forfeiture was not demandable at the day, nor at all, if paid within thirty days. If the plaintiff could have established this as a custom, her case would on this point have been clear of difficulty; for the testimony was, that she had tendered the premium for the non-payment of which the forfeiture was claimed once, and perhaps twice, within thirty days after it was due by the terms of the policy. We do not know whether there is or is not such a custom. That is not our question at this time; the plaintiff offered to prove it, and the offered testimony should have been admitted, in our opinion. This error, therefore, is sustained.

Besides this, we think there was evidence in the case for the jury in other aspects of it. If it was the practice of the company to notify the plaintiff of the times her premiums were due and payable, and omitted on the occasion of the default, or if they so dealt with her as to induce a belief that the clause of forfeiture would not be insisted on in her case, in case of a dereliction of payment at the day, and it was declared that the only risk she ran in not paying at the precise time was death occurring in the interval of non-payment of overdue premiums, and thus put her off her guard, they ought not to be permitted to take advantage of a default which they may themselves have encouraged. That was an aspect of the case in proof upon which the jury should have been allowed to pass. In transactions of this nature, it is easy to mislead by a pretense of liberality, if followed by entire strictness in practice; and the only cure for this is the inquiry by the jury whether the party has been misled by the former. If so, it is a fraud upon the party's rights, which ought to be condemned and redressed. The cases of *Buckley v. United States Ins. Co.*, 18 Barb. 541, and *Reese v. Insurance Co.*, 28 Id. 556, strongly sustain this view. In this manner, a waiver of strictness may take place; and it is not to be doubted that the company may waive defective compliance with the rules of insurance: *Inland Ins. etc. Co. v. Stauffer*, 33 Pa. St. 397; *Simpson v. Insurance Co.*, 38 Id. 250; *Insurance Co. v. Updegraff*, 40 Id. 311; *Insurance Co. v. Sennett*, 41 Id. 161; *Insurance Co. v. Updegraff*, 43 Id. 350; *Insurance Co. v. Schollenberger*, 44 Id. 259; *Coursin v. Insurance Co.*, 46 Id. 323. Forfeitures are odious in law, and are enforced only where there is the clearest evidence that that was what was meant by the stipulations of the parties. There must be no cast of management or trickery to entrap the party into a forfeiture. If the strictness in this case was the result of a desire to wind up business (and we learn the company did not exist long thereafter), and it was adopted to avoid a return of premiums, the least which can be said of it is, that it was a most discreditable transaction. We do not know how this was. At the same time, it is singular that absolute strictness should be required in paying premiums, if the company had it in contemplation to cease insuring, and to return the premiums to parties who had regularly paid them, as they would be obliged to do. There is, undoubtedly, a comity, at least, extended to all insurers in regard to the matter of paying premiums. No company

would be worthy to receive the countenance of the public which should establish a practice that would, for every little dereliction, forfeit the policies of the insured, even if it had the power.

We think the learned judge erred in awarding a nonsuit, as well as in rejecting the proposed testimony, and that the nonsuit must be set aside, and a *procedendo* awarded; which is done accordingly.

USAGE MAY BE CONSIDERED IN CONSTRUCTION OF CONTRACT: *Johnson v. Concord R. R. Co.*, 88 Am. Dec. 199; but if repugnant to terms of contract, is inadmissible to control it: *Boon v. Steamboat Belfast*, 88 Id. 761; *Dickinson v. Guy*, 83 Id. 656; *Boardman v. Sprague*, 90 Id. 196; and usage will not be permitted to conflict with settled rule of law: *Dodd v. Farlow*, 87 Id. 726; *Reed v. Richardson*, 93 Id. 155.

USAGES AS AFFECTING CONSTRUCTION OF CONTRACT OF INSURANCE: See *Merchants' Ins. Co. v. Shillito*, 88 Am. Dec. 491, and cases collected in note 596.

WAIVER OF CONDITIONS IN POLICIES OF INSURANCE, and what amounts to: *Ripley v. Atlas Ins. Co.*, 86 Am. Dec. 372; waiver of condition respecting payment of premium notes: *Hodsdon v. Guardian L. Ins. Co.*, 93 Id. 73.

WAIVER BY INSURANCE COMPANY OF RIGHT TO INSIST that policy is forfeited: *Conigland v. Insurance Co.*, 98 Am. Dec. 89. Compare *Diehl v. Insurance Co.*, 98 Id. 302, and cases collected in note 303.

FORFEITURES ARE NOT FAVORED IN EQUITY: *Smith v. Martner*, 69 Am. Dec. 73, and note 85; *Whitton v. Whitton*, 75 Id. 163; nor in law; and when once waived will not be assisted by the court: *Garnhart v. Finney*, 93 Id. 303.

THE PRINCIPAL CASE IS CITED in support of the general rule that the offer to prove a usage of trade is always competent to give a construction to the terms of a contract, in *Burger v. Insurance Co.*, 71 Pa. St. 424; *Carter v. Philadelphia Coal Co.*, 77 Id. 291; *Guard Life Ins. Co. v. Mutual L. Ins. Co.*, 86 Id. 230; S. C. again, 100 Id. 181; and is cited to the point that forfeitures are odious in law in *Guard L. Ins. Co. v. Mutual L. Ins. Co.*, 97 Id. 30.

BUTCHER v. YOOCUM.

[61 PENNSYLVANIA STATE, 153.]

NOTICE TO PURCHASER OF EQUITABLE INTEREST need not come from the party interested, or his agent, for it is sufficient if it comes *aliunde*, provided it is of a character likely to gain credit.

WHERE WIDOW ATTEMPTS TO CONVEY EQUITABLE INTEREST OF HEIR, his grandfather is a proper person to give notice of such equitable interest to the purchaser.

THE opinion contains the facts.

Jessup and Hirst, for the plaintiffs in error.

Titus, Pollock, and Orwig, for the defendant in error.

By Court, READ, J. The defendant claimed title to the premises under a deed dated January 6, 1847, and recorded the next day, from B. Lee to Margaret Yocum, the mother of the plaintiff, and a conveyance of the same by Margaret Yocum to Samuel Butcher, the defendant, dated January 3, 1848, and recorded the 11th of February, 1848.

On the part of the plaintiff, it clearly appeared that these premises were the property of James Yocum, the husband of the said Margaret Yocum, and that he died on the 9th of September, 1846, leaving a widow and a child, the present plaintiff, a boy a few years old. The first three exceptions, which are the subject of the first three specifications, were to matters showing the nature of the title of the decedent, Yocum, and were clearly evidence in the cause. The fourth specification of error raises the real question in the case; it is, that the court erred in refusing to charge as requested in defendant's third point, and in telling the jury "that if they should find from the evidence that Joseph Huston was the grandfather of Edmund G. Yocum, the plaintiff, and that before Butcher bought the property he was distinctly informed by Huston that no title could be made for the property, except through the orphans' court, because James Yocum owned the property at his death, and had died intestate, leaving two children, of whom the plaintiff was one, such notice was not to be regarded as coming from a stranger, and is sufficient to have put Butcher on inquiry as to the title of any one else offering to sell it." The verdict of the jury found the facts required by the charge of the court, and the evidence was clear, distinct, and positive on the question of notice. The only point open is, whether the court were right in saying that notice by the grandfather was not to be regarded as coming from a stranger.

In 1 Story's Eq. Jur., by Judge Redfield, sec. 400 b, it is said: "And this is not indispensable to the validity of notice of an equitable interest, that it should come from the party or his agent; it is sufficient if it be derived *aliunde*, provided it be of a character likely to gain credit." This seems also to be the opinion of the learned American editors of White and Tudor's Leading Cases in Equity, vol. 2, p. 158; "and," say they, "it can hardly be doubted that the same result will follow from the statement of any fact within the knowledge of the party who states it, which shows that the title purchased is subject to the legal or equitable claims of other persons. This course of reasoning seems amply sufficient to sustain

the case of *Ripple v. Ripple*, 1 Rawle, 386, where information of the existence of an equitable charge on land was held to be notice, although not proceeding from the parties directly interested, without a resort to the special ground on which it was decided."

The late case of *Lloyd v. Banks*, L. R. 3 Ch. 488, S. C., 37 L. J., N. S., 881, decided by Lord Cairns, clearly supports this doctrine. In this case, *Ripple v. Ripple*, *supra*, the notice was given by an uncle of a female in a state of idiocy; "and surely," says Gibson, C. J., "one so near in blood as an uncle might lawfully interpose for their protection." In the present case, the plaintiff was an infant of tender years, his mother, the person to convey away his estate, his guardian standing by. Was not his grandfather not only a proper person to give notice to a purchaser, but bound as an honest man to do so? In *Seibert's Appeal*, 19 Pa. St. 56, Judge Lewis says: "In Pennsylvania, the grandfather, as well as the father, is required, by the act of the 13th of June, 1836, section 28, to relieve and maintain his grandchildren when their necessities require it. This statute is in accordance with the moral sense of mankind. Those who suppose that infant grandchildren do not, upon the death of their parents, take the place of the latter in the affections of their grandfather, are strangers to the most ordinary manifestations of the best feelings of the human heart; as the mementos of the departed child, they have peculiar claims to his regard; and their unprotected helplessness, produced by the common bereavement, in most cases rivets his affections to them closer than they ever clung to their parents."

We cannot doubt that the grandfather in this case was a proper person to give notice to the defendant Butcher of the title of his infant grandchild to the property he was about to purchase.

There is nothing in the fifth and sixth errors.

Judgment affirmed.

NOTICE FROM FRIEND OR RELATION of the adverse claimant has been held to be sufficient as against the purchaser: *Wade on Notice*, 2d ed., sec. 23, citing the principal case.

SIMONS v. VULCAN OIL AND MINING COMPANY.

[61 PENNSYLVANIA STATE, 202.]

PARTIES WHO ACT AS AGENTS FOR CORPORATION to be formed, in acquiring property cannot charge a profit as against their principal, nor can they charge a profit if they assume to act without precedent authority, if their transactions are accepted as the acts of agents by the corporation, and if, in order to create the corporation, they represent themselves as acting for the company to be formed, and propose to sell at the prices they pay, and their purchases are taken on such representations, and stockholders invest thereon; it is fraud on the company and interested parties to allow such agents to retain profits paid them in ignorance of the true sums actually advanced in making purchases.

IN INVESTIGATIONS TO ESTABLISH FRAUD, great latitude of inquiry is always admissible.

IN ACTION AGAINST AGENTS to recover profits made by them from the purchase of property for a corporation, to be created afterwards, a prospectus, advertisement, and receipt issued by one is material evidence against all the agents, provided the purchase and sale was the combined act of all of them.

DECLARATION OF PARTY TO SUIT relating to the subject-matter is evidence against him, no matter when made. Whether they affect another party to the suit depends upon whether their acts were joint; if so, the declarations of one is evidence against both.

WHERE PARTIES ARE, OR ASSUME TO BE, PARTNERS, and jointly interested in the subject-matter in suit, declarations made by one relating thereto is evidence against both.

REFUSAL TO STRIKE OUT EVIDENCE OF INTERESTED WITNESS is not error if the testimony was received without objection. Correction should be made through a request to charge the jury to disregard the evidence.

FACT THAT WITNESS IS STOCKHOLDER in a company to which plaintiff is indebted does not render him incompetent. A creditor may be a witness for his debtor.

WORDS "ORIGINAL OWNERS," IN PROSPECTUS of corporation to be formed, importing that no profits would be added to prices paid for their lands on account of any intermediate party between it and the precedent owners, and excluding the idea of purchase at speculative prices, are not terms of art, science, or trade, requiring the aid of experts to explain.

AGENTS, PARTNERS, OR ASSOCIATES cannot make profit out of their principal, copartner, or co-associate for whom they have undertaken to act.

DIRECTORS ARE BUT AGENTS AND TRUSTEES OF CORPORATION; they have power only to act for the interest of the company, not against it.

SHARE-HOLDERS CONSTITUTE CORPORATION HAVING STOCK, and not the directors. The acts of the latter may be inquired into by the former.

FRAUD PERPETRATED AGAINST CORPORATION by any or all of the directors may be redressed by an action in the name of the corporation.

WHERE AGENTS BUY LANDS FOR CORPORATION to be formed, and disclose the exact price paid, and refuse to sell for less than the sum asked, they may retain the profit made; but when they represent to sell at cost, and through concealment and misrepresentation reap a profit, they cannot retain it.

IN ACTION AGAINST AGENTS TO RECOVER PROFITS made illegally from the sale of land for a corporation to be formed, actual receipt of money by all must be proved to make all liable.

RECEIPT OF MONEY BY AGENT IS PRIMA FACIE EVIDENCE of its receipt by the principal; and its receipt by a partner is *prima facie* evidence that it was received for the benefit and use of the firm.

THE opinion states the facts.

Burton and Cuyler, for the plaintiffs in error.

Miller, for the defendants in error.

By Court, THOMPSON, C. J. A great point of contest on the trial below was as to the capacity in which the defendants acted in acquiring the territory on which operations in mining for oil were to be inaugurated and carried on by a company intended to be formed, and whether they professed to their associates and the public that they had purchased it for the company, and were conveying it to the company at original cost, content like other share-holders to take their chance of profits out of the stock to be issued. There was much testimony on the point, tending to prove these to have been their representations. Besides the deeds from their vendors, which exhibited on their face as considerations paid sums greatly in excess of those actually paid, prospectuses were issued by them in connection with their associates for circulation and publication in newspapers, representing that the lands acquired were obtained at first cost from the vendors. All the testimony on this point received by the court was submitted to the jury with full and explicit instructions by the learned judge trying the case. In these instructions was contained the principle accurately announced, that if the defendants in fact acted as agents of the company in acquiring the property, they could not charge a profit as against their principal. Nor was their position any better if they assumed so to act without precedent authority, if their doings were accepted as the acts of agents by the association or company. If, in order to get up a company, they represented themselves as having acted for the association to be formed, and proposed to sell at the same prices they paid, and their purchases were taken on these representations, and stockholders invested in a reliance upon them, it would be a fraud on the company, and all others interested, to allow them to retain the large profits paid them by the company in ignorance of the true sums actually advanced.

On the facts, as submitted, the jury found against the defendants, and we are now to see whether there was any error in the law as laid down by the court.

In Lindley on Partnership, 497, the principles arising on facts like those referred to are very succinctly stated. The language of the learned author, after stating the rule that neither partners nor directors of a company are at liberty to make individual profits out of the business of the concern without the knowledge and assent of associates, says: "The rule under consideration is peculiarly applicable to transactions which precede the formation of a company or partnership. Judging from recent events and disclosures, nothing seems more common than for a person in getting up a company to obtain for the company property of which it is in want, and try and make the company pay him more than he gave for it. Such a transaction can never stand. There may undoubtedly be a valid sale to a company by persons engaged in getting it up; but once let it be shown that the alleged vendor obtained the property when it was his duty to obtain it for the company, and it immediately follows that he cannot, without the fullest disclosure on his part, charge the company with more than he actually gave." To the same effect, also, is the opinion of Sir J. Romilly, M. R., in *Bank of London v. Tyrrell*, 5 Jur., N. S., 924. See also the same principle in *Great Luxembourg R. R. Co. v. Magney*, 25 Beav. 586.

The principle is undoubtedly the same where parties profess to have acted for a company, and their purchases have been accepted on representations that they were made for it. In one or the other of these attitudes, namely, as agents of a company to be gotten up, or as having professed so to have acted, the jury must have found they stood. In either, it seems clear, they could not legally retain the advance price on the property which they received.

To ascertain whether the result arrived at through the finding of the jury is to stand, we will consider first the exceptions to the ruling of the court on points of evidence:—

1. The exception to the exclusion of a portion of W. L. Humphreys's deposition was not much insisted on in argument, nor could it well have been, and we dismiss it without further notice.

2. The second and third exceptions relate to reception in evidence of the prospectuses of the Vulcan Oil Company, published on the 27th of November and the 17th of December,

1864. We think they were admissible, without doubt, in the circumstances of the case. Notwithstanding the action was in form *ex contractu*, yet it could only be successfully maintained by showing imposition and fraud on the part of the defendants in dealing, as it was alleged they did, with the company, by reason whereof *ex æquo et bono* they ought not to be allowed to retain the moneys wrongfully obtained from it. To establish fraud was the turning-point in the plaintiff's case. That was to be done by proving facts and circumstances, the results of the acts and declarations of the defendants upon the company. In all such investigations, great latitude of inquiry is always allowable.

There was testimony proper to go to the jury, tending to show Weeks's connection with the advertisement of the 27th of November. Such, for instance, as the receipt of the publisher, for his charge for advertising, handed with other papers of the company by him to the secretary after its organization; the reference to Weeks's place of business in it as the office of the company, and to negotiations then on foot, which were subsequently shown to be those conducted by the defendants through their agent Humphreys, who was at that time in the West looking for oil territory for them. There were many other circumstances preceding, or subsequently given in evidence, to warrant the reception of this evidence. It was a step towards the fact to be established, namely, that the defendants were holding out to the public that real estate was being secured by them for a company to be organized, and that it was to be put into the concern at what it cost, and no more. It was material evidence against both defendants, provided the transaction of the purchase and sale was the combined act of both, which the testimony certainly, we think, sufficiently showed it was. It was properly received.

So also was the prospectus of the company of the 17th of December. That was signed by Simons, as president *pro tem.*, and Willoughby, as secretary *pro tem.* It was the declared act of one of the defendants, and was clearly evidence under the bill of particulars, which proposed to show the joint action of the defendants in accomplishing the sale to the company for eighty-one thousand dollars and upwards, and their joint receipt of the purchase-money from it. As the act of Simons, it was clearly evidence against him, and might or might not be against Weeks, the other defendant, on the testimony given and to be given. It was a fact in the transaction, and not to

be excluded because of a possibility that the jury might mistakenly suppose the company to be organized before it was in fact. If that apprehension was the ground of objection, the jury would doubtless have been apprised that they must not fall into that error. We think the evidence was properly received, and this error is not sustained.

3. We perceive nothing in the argument of the fourth, fifth, sixth, seventh, and eighth assignments of error, which creates a doubt of the accuracy of the learned judge below in the rulings which are the subject of them. We will consider them together.

The declarations of Weeks, a party to the suit, relating to the subject-matter of it, were evidence against himself, no matter when made. Whether they should affect Simons, would depend on whether their acts amounted to a joint enterprise, to induce the company about to be organized to agree to purchase, and after organization to perfect the purchase of the lands secured by them in West Virginia, at the sums they represented that they had paid for them. Under such a state of facts, the declarations of one would be evidence against both. If they assumed to be or were partners in fact in the transaction, there could be no doubt that the declarations would be evidence against both. There was evidence of a partnership, or joint purchase by the defendants of these lands, as well as of a sale for the joint interest of both. On both grounds the testimony was properly received.

Nor was there any error in the refusal of the court to strike out the testimony of Brosius on the ground of interest, even if such refusal was assignable for error, which we have said is not the case where the testimony of witnesses is given without objection: *Ashton v. Sproule*, 35 Pa. St. 492. The correction in such cases is a request to charge that the evidence be disregarded. His supposed liability for non-performance of his official duties was neither fixed nor threatened, so far as the objection discloses. He was certainly not directly involved in the result of the verdict, nor could it be evidence for or against him in any subsequent suit. His supposed liability was a presumed peril, contingent and remote, and did not disqualify him. Indeed, it would have required a trial to determine the validity of the grounds of objection, and the court could not arrest its proceedings to indulge the parties in this. There was no error in this ruling.

The fact that the witness Jacob Amon was a stockholder in

a company to which the plaintiff was indebted, was not a ground of incompetency to testify. A creditor may be a witness for his debtor: *Fell v. McHenry*, 42 Pa. St. 41; *Gillespie v. Miller*, 37 Id. 250. We have already noticed an objection to the testimony given of the declarations of the defendants. No matter where they were made, if they were relevant they were receivable. Their effect would be another matter, with which the jury had all to do.

4. The ninth specification of error is overruled. The words "original owners," in the prospectus, were not terms of art, science, or trade, which required the aid of experts to explain. Nobody could well mistake their meaning. They simply imported that no profits were added to the prices paid by the company for their lands, on account of any intermediate party, buyer, or agent between it and the precedent owners of the soil. It excluded the idea of a purchase at speculative prices. This was the import of the terms, and to convey that idea in plain language was the object in using them. The court committed no error in refusing to hear an exposition of words which would in all probability have disturbed their meaning, or have attributed an entirely artificial one, supposed but not settled to spring out of dealings incident to oil property. Their ordinary meaning was well understood, and in this sense they were most fitly used; at least, there was nothing to show that they were not so used. It was, therefore, not a case for experts or skilled witnesses to interpret.

5. The exceptions to the charge are thirteen in number. The answers to the first, second, and third of these were substantial, and I might say literal, affirmations of the points of the defendants of which they are predicated. The court laid down the law favorably to them by the instruction to the jury, that unless the land was purchased for the company by the defendants, there could be no recovery against them for the advanced price paid them. In this the court but affirmed the familiar doctrine that an agent cannot make profits out of his principal, in the business of the agency, nor a partner out of his copartner, without his assent, nor an associate out of co-associates for whom he has undertaken to act. That this is the law, authorities need not be referred to to prove. It is elementary. It was also assented to, that both defendants must be shown to have engaged in the transactions of the purchase and sale afterwards to the company, and in a joint participation in the receipt of the purchase-money before there

could be a recovery against them. This was what the defendants contended for, and the answers of the court need no vindication at our hands.

The fourth and last point the learned judge refused. It assumed the fact that the land was put in at eighty-one thousand dollars in the formation of the company by the assent of the five original copartners; that they represented the company, and bound it by their acts and assent, and that therefore the verdict should be for the defendants.

This, in effect, asserts the position that the organizing board of directors was the company, and whatever it did could not be inquired into by the corporation put in motion at the instance of the stockholders. This is an error, and results from overlooking the fact that directors are but the agents and trustees of the company; that they have power only to act for the interest of the company, and not against it. The shareholders constitute the company, where there is stock, and not the directors. It was therefore well put, in the charge of the learned judge, that the directors had no power to bind the stockholders by allowing profits to the defendants, after holding out in their prospectus that the property was obtained at original prices; and that the defendants could not claim any, if they hold out that they had purchased the property for the company, and were conveying at original prices. A fraud perpetrated against the corporation by any or all of the directors may assuredly be redressed by such an action in the name of the corporation. As already said, they are its agents and trustees, which implies accountability to their principal. It was therefore not error to hold, as was held in the court below, that the act of the directors, even if they knew the price paid for the land was less than the sum at which it was sold by the defendants to the company, did not preclude inquiry, and a recovery back of the excess, if that excess was not legally receivable by the defendants. In law, this position was undoubtedly and properly asserted, and at the same time the jury were left free to consider whether the facts presented such a case. We do not doubt that if the defendants had disclosed the exact sum at which they bought the lands, and had refused to sell for less than the sum which they eventually received, their right to hold the sums received would have been unimpeachable; but the facts in evidence were such as satisfied the jury that there was concealment and misrepresentation as to the terms of purchase by the defendants pro-

fessing to have acted for the company. The deeds from the original vendors proved this. But it is not our purpose to discuss the facts, and we will not enlarge further than to say we think the court committed no error in refusing to affirm the defendants' fourth point, and charging as they did, in the general charge, in this phase of the case.

6. We have very carefully examined the charge of the learned judge, and the exceptions to it, and we think there is nothing in any of them which needs discussion to vindicate the accuracy of the court. The case was presented to the jury fairly and clearly, on unexceptionable principles, all of which were afterwards reviewed and approved by the court in bank. And as on a careful review here we have not discovered error in any of the specifications brought to our notice, the consequence is, that the judgment below must be affirmed.

The point whether there could be a recovery against both defendants in this form of action, without showing the actual receipt of the money by both, although not distinctly raised by any point in the case, has been somewhat discussed on argument. Undoubtedly, this was a fact necessary to be proved, but like any other fact, it was susceptible of being established by proof of acts and declarations of the parties sought to be charged. The receipt by an agent of a party would be *prima facie* evidence of the receipt by the principal; and as partners are agents for the firm, and for each other, when the transaction is single, what possible inference could there be from the receipt of one, but that it was for the use and benefit of both? Repeated declarations, accompanied by the strongest corroborative acts, showed these defendants to be partners, and jointly interested in the proceeds of the transaction with the plaintiffs' company. The receipt, therefore, by Weeks, of the money from the company, was susceptible of sustaining the inference that it was for the benefit of his copartner as well as himself, and threw upon the latter the burden of establishing a different state of facts. This he did not do. In fact, as corroborative of the plaintiff's case, the sum of twelve thousand dollars, part of the profits of the transaction, was actually received by Simons himself. Under this state of the proof, if believed, the receipt of either would be the receipt of both, and upon this ground a recovery against both would be right.

There was undoubtedly great laxity of morals in dealing about real estate in oil sections during the excitement consequent on its discovery. Many transactions like that under con-

sideration have taken place without being subject to judicial investigation, and parties have pocketed rich returns, while others have suffered disastrous diminution of their means; but the impunity with which many have speculated by unjustifiable means, and escaped a call to account to those wronged, does not impair the efficiency of the law to redress such a wrong whenever it is judicially made to appear. Hundreds have done as was done in the case before us; it had become a common thing, and men of fair standing did not hesitate to represent property as having cost sums much beyond those paid by them as inducements to enlist purchasers. This was wrong in law as well as morals, where there was a relation of trust and confidence, in fact or assumed; and in such cases, it is the morality of the law to hold the party so representing to the position he may have occupied, or assumed to have occupied.

Seeing no errors in the record, we have nothing to do but to affirm the judgment of the court below.

Judgment affirmed.

IN INVESTIGATING FRAUD, CONSIDERABLE LATITUDE MUST BE INDULGED in the admission of evidence: *Hoxie v. Home Ins. Co.*, 85 Am. Dec. 240, and note 251; *Stewart v. Severance*, 97 Id. 392.

DECLARATIONS AGAINST INTEREST ARE ADMISSIBLE: *Mulholland v. Elliott*, 78 Am. Dec. 495, and note 498. And declarations made by one of the parties having a joint interest in the suit are evidence against both: *Hurst v. Robinson*, 53 Id. 134.

DECLARATIONS MADE BY ONE PARTNER BIND BOTH: *Foltz v. Wilson*, 83 Am. Dec. 599.

ERROR IN ADMITTING EVIDENCE may be cured by instructions to disregard it: *Union Water Co v. Crary*, 85 Am. Dec. 145, and note 151.

DIRECTORS OF CORPORATION ARE LIABLE FOR FRAUD: *Smith v. Peor*, 63 Am. Dec. 672; *Salmon v. Richardson*, 79 Id. 255, note 263.

PARTIES, FROM TIME THEY BEGIN TO FORM ASSOCIATION or partnership, stand in a confidential relation to each other, and to all others who may subsequently become members; none of them can purchase property for the company, and sell it at an advance, without disclosing the facts; they cannot reap a profit out of it. And one partner cannot buy and sell for or to the firm at a profit; nor, if the partnership is in contemplation, can he purchase with a view to a future sale without accounting for the profit. Within the scope of the partnership each partner is agent for the others, and he cannot divest himself of such character without their knowledge: *Denmore Oil Co. v. Denmore*, 64 Pa. St. 50, citing the principal case.

AGENT CANNOT MAKE PROFIT out of his principal, nor a partner out of his copartner, without his assent, nor an associate out of his co-associate, for whom he has undertaken to act: *Short v. Stevenson*, 63 Pa. St. 97, citing the principal case.

WHERE PARTIES TO ILLEGAL ACT are shown to have acted in concert for their joint benefit, the acts and declarations of one bind all: *Burns v. McCabe*, 72 Pa. St. 315, citing the principal case.

FRAUD IS QUESTION FOR JURY, and the evidence is permitted to take a wide range, as in most cases it rests upon circumstance, and not direct proof: *Ferris v. Irons*, 83 Pa. St. 182, citing the principal case.

PATTISON'S APPEAL.

[61 PENNSYLVANIA STATE, 294.]

CONTRACT FOR STANDING TIMBER TO BE TAKEN OFF LAND AT DISCRETION AS TO TIME IS INTEREST IN LAND, within the statute of frauds, the transmission of which must be in writing.

GROWING CROPS PASS TO ADMINISTRATOR, AND NOT TO HEIR, and are liable to be seized and sold on execution as personal chattels of a debtor.

THAT REAL INTERESTS SEIZED IN EXECUTION ARE TO BE SOLD AND PASS AS REAL ESTATE is a rule which admits of few, if any, exceptions.

STATUTE OF FRAUDS—CONTRACT FOR SALE OF GROWING TIMBER.—The holder of a contract in writing for the sale of growing timber, absolute on its face, but accompanied by a parol defeasance, sold it to a *bona fide* purchaser, without notice of the defeasance: *held*, that such purchaser took a full title.

BILL in equity, filed by Charles Pattison against Walker, Lathrop, and Somers, setting out in substance that one Billings contracted to sell and convey the white and Norway pine and oak timber, suitable for sawing and manufacturing into lumber, which was then standing, lying, or being on a certain tract of land located and described; that certain parties by sundry conveyances became owners of the title to two thirds of said timber, and conveyed all their interest to one Middaugh, who afterwards transferred two thirds of his interest to one Damon and T. Pattison; that afterwards Middaugh and T. Pattison assigned their interest in the timber to Somers, as collateral security to indemnify Somers for advances made to them, Somers then agreeing to reassign his interest to them when said advances should be repaid; that Middaugh and T. Pattison delivered to Somers, according to agreement, a sufficient quantity of lumber to repay him his advances, and Somers refused to assign his interest in the timber to them, but in fraud of his agreement had sold and transferred it to one Hungerford, and that Hungerford had sold and transferred his interest to said Walker and Lathrop; that the two latter had cut and manufactured a large quantity of the timber into lumber, and were still engaged in manufacturing lumber from

the same tract; that the plaintiff was owner of all T. Pattison's interest in the timber, by private sale and transfer from him, and by public sale on a writ of *venditioni exponas* on a judgment recovered against him, of which the defendants had notice. The bill prayed an account against the defendants, that Walker and Lathrop be directed to pay what was due by them, that the defendants be enjoined from cutting any more timber, that a commission issue to divide and allot one third of the timber to the plaintiff, that conveyances be executed, etc. The defendants answered, averring that the assignment to Somers was on its face absolute, and they had no knowledge of the assignment being held as collateral security, etc., and that Walker and Lathrop owned all the interest that Hungerford had in the timber. Hungerford answered separately, averring that he bought from Somers for a valuable consideration, without any knowledge of an agreement by Somers to reassign, or of any equities whatsoever, and that he was an innocent purchaser for value, without notice. Walker and Lathrop likewise answered separately, that they bought from Hungerford without knowledge, etc., and were innocent purchasers for value, without notice. The evidence showed the conveyances as set out in the bill, also a levy by the sheriff under execution against T. Pattison on "the equal undivided third of all the white and Norway pine and oak timber standing or lying on a tract of land known as the Billings tract," etc.; also a sale under a *venditioni exponas* "to C. L. Pattison, of the equal undivided one-third interest in the timber lying and standing on the annexed described tract of land," etc. There was no deed from the sheriff. Likewise the following: "For a valuable consideration, to me in hand paid, I hereby sell to C. L. Pattison all my right, title, and interest to all the timber cut by Walker and Lathrop on the Billings land, situate," etc. "T. Pattison." The evidence showed that the assignment to Somers was on the conditions set out in the bill, but not that either Hungerford, Walker, or Lathrop had notice of the conditions. The evidence as to the payment of all the advances made by Somers was conflicting. The court held that the interest of the vendees of Billings was such an estate in land as could only pass by grant, and that the sale of the estate of one of the holders of the Billings contract as a chattel would not divest the rights of such holder. Bill dismissed without prejudice, and the plaintiff appealed.

W. H. Smith and C. H. Seymour, for the appellant.

M. F. Elliott and F. C. Smith, for the appellees.

By Court, THOMPSON, C. J. It would strike the unprofessional mind in this state with scarcely less surprise than it would the professional, if it were announced that the growing timber on a man's land might be held by a contract in parol, against everybody, whilst the soil itself could only be legally transmitted by an instrument of writing; that what we have been accustomed to consider an integrant part of the freehold, the growing timber, might be sold and transmitted with no more solemnity than a pile of boards at a saw-mill or bushels of wheat in a barn. If such should come to be the law, its practical operation would be, that one man might own all the timber on another man's land by a secret and unrecorded contract, while the title to the soil remained in the latter. Or A might own the timber on Black Acre, and B that on White Acre, and so on to the end of the chapter. If such interests might pass by parol, or word of mouth, and become mere chattel interests, they would in time be liable in the hands of owners to seizure and sale by sheriffs and constables as personal chattels. From such a condition of things, nothing but inextricable confusion could possibly follow. We regard a contract for the standing timber on a tract of land, to be taken off at discretion as to time, as an interest in land, and within the statute of frauds and perjuries, the transmission of which must be by writing.

The distinction in the English books between the *prima vestura* and the *fructus industriales* of land, namely, the natural growths, and the products of agriculture, has always been regarded with us. We have uniformly held that growing crops pass to administrators, and not to heirs, and that they are liable to be seized and sold on execution as personal chattels of a debtor. So in regard to the former, whenever we have spoken on the subject there is a concurrence likewise in the doctrine. In *Yeakle v. Jacob*, 33 Pa. St. 376, this court held that the grant to one of a perpetual right to enter and cut timber on another's land, for the purpose of repairing fences, was within the statute of frauds and perjuries; that such a right is an interest in land, and cannot pass by parol. This case was cited and applied in *Huff v. McCauley*, 53 Id. 206 [91 Am. Dec. 203]. Many if not all the authorities bearing on this question may be found referred to in the arguments and opin-

ions in these two cases, and I will not burden this opinion with them. We think the principle of them is indisputable. Nothing can be drawn from the case of *Caldwell v. Fulton*, 31 Id. 475 [72 Am. Dec. 780], and subsequent cognate cases, in which this court has held to the right of severance of a freehold estate into one or more estates of freehold within the same boundaries, that is, the mineral under the surface, to constitute a separate estate from the surface land. The distinctiveness of the purposes and uses of these interests renders the division natural, and not productive of any confusion, and very important to both interests. But it was never held that either was a personal chattel, or to be so treated. Nor are we for a moment to doubt but a conveyance of all the timber on a man's land, to be taken at discretion, is not an interest in land which may be conveyed by an instrument in writing. That is not our question; it is whether such an interest is personalty or realty; and we unhesitatingly hold it to be the latter. It is a rule which admits of few, if any, exceptions, that real interests seized in execution are to be sold and pass as real estate. Applying these principles to the case in hand, and regarding, as we do, the interest acquired and held by Middaugh and Pattison in the timber on the land mentioned in the bill as an interest in the realty, the sale of Pattison's interest as a personal chattel we hold did not pass the title: *St. Bartholomew v. Wood*, 61 Pa. St. 96. The learned judge was altogether right in his ruling on this point.

But the plaintiff claims that the assignment to him by T. Pattison vested in him the right to call on the defendants, the vendees of Hungerford, who purchased from Nelson L. Somers, to account for profits accruing to his assignee under the terms of an alleged contract with Somers, to reconvey to him and Middaugh, on being paid advances, interest, etc., made by him to their benefit and use. That Somers has been paid has not been established by preponderating proof,—indeed, by any proof, for we think the assignor was not a competent witness for the assignee, on the principle of *Post v. Avery*, 5 Watts & S. 509, and other cases. That, however, need not be regarded now. The testimony was heard, and it was rebutted by countervailing proof, which left the case in *equilibrio*, if not against the plaintiff. But in view of another consideration, this was of no consequence. It was neither charged nor proved by the plaintiff that Hungerford had notice of the secret agreement between Somers and Middaugh and Pattison, when he purchased

of the former. Somers's title was indefeasable on its face, and without notice Hungerford took what it purported,—a full title. This being so, Somers's conveyance passed every interest of Middaugh and Pattison to Hungerford, and of course left Pattison to look to Somers for redress, and not to innocent purchasers. The fact that Hungerford afterwards took a conveyance also from Middaugh establishes nothing. It might have been for a good reason or a bad one; whether the one or the other, it establishes nothing of itself, and aids nothing in the proofs.

After a careful examination of all the grounds taken, we think the case was rightly determined by the learned judge below.

The decree is affirmed at the costs of the appellant, and the appeal is dismissed.

SALE OF GROWING TREES, WITH RIGHT TO ENTER ON LAND, AND REMOVE THEM AT ANY TIME, CONVEYS INTEREST IN LANDS, within the meaning of the statute of frauds: *Kingsley v. Holbrook*, 86 Am. Dec. 173; and see note 182, where the cases bearing upon the subject are fully collected; *Huff v. McCauley*, 91 Id. 203.

PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT CROP OF CORN GROWING UPON LAND AT TIME LAND WAS CONVEYED DID NOT PASS BY DEED, but was reserved by the grantor: *Flynt v. Conrad*, 93 Am. Dec. 588; and see *Backenstoss v. Stahler*, 75 Id. 592, and note.

EXECUTION MAY BE LEVIED ON DEFENDANT'S INTEREST IN GROWING CROP OF GRAIN under a contract to work land on shares: *Bernal v. Hovious*, 79 Am. Dec. 147.

GROWING CROP AS BETWEEN VENDOR AND VENDEE IS PART OF REALTY; and as a general rule, the sale and conveyance of the land by its owner carries the property in the crop to the purchaser: *Turner v. Cool*, 85 Am. Dec. 449, and see note 452; *Aikes v. Hinckler*, 85 Id. 407.

THE PRINCIPAL CASE IS CITED to the first point stated in the *syllabus*, in *Bowers v. Bowers*, 95 Pa. St. 490; *Miller v. Zufall*, 113 Id. 323; and to the second point stated in the *syllabus*, in *Jones's Appeal*, 102 Id. 288; it is distinguished, and is cited in support of the distinction made between contracts having a view to the immediate severance of the timber and those not having such view, in *McClintock's Appeal*, 71 Id. 367.

SEELY v. ALDEN.

[61 PENNSYLVANIA STATE, 302.]

MEASURE OF DAMAGES IN TORT IS ACTUAL COMPENSATION for the injury.

Whatever ascertains this is proper evidence for the jury.

INADVERTENT OR UNINTENTIONAL INJURIES, OR ACTS UNACCOMPANIED WITH MALICE, draw after them only their immediate and direct consequences, and not those remote and speculative. In such cases, damages are merely compensatory.

GROSSLY NEGLIGENT OR MALICIOUS ACTS are the subject of large damages, resting in the discretion of the jury, uninfluenced by prejudice or passion.

DAMAGES FOR INJURIES TO PROPERTY vary according to the claimant's right.

OWNER OF FREEHOLD MAY RECOVER FOR INJURY which permanently affects or depreciates his property; but a tenant or one having only a possessory right can recover only for an injury to his use or enjoyment of it.

WHEN OWNER OF PROPERTY IS IN ACTUAL POSSESSION and use of it, he is entitled to recover all damages flowing directly from the tort complained of, whether the injury is permanent or temporary.

COMPENSATION FOR DIMINISHED ENJOYMENT OR USE OF PROPERTY for a number of years does not compensate for the diminished value of the land itself.

WHEN LAND IS LEASED, INJURY WHICH DIMINISHES ITS ANNUAL PROFIT to the tenant, and also the value of the property itself, is the subject of a double action, in which the tenant and the landlord may each recover his loss.

WHEN OWNER OF LAND IS ALSO OCCUPANT, he cannot recover damages for injury to the use, and also for the permanent injury. He cannot recover double compensation for the same loss.

WHEN THERE ARE DIFFERENT MODES of measuring damages resulting from a tort, depending on the circumstances, the only proper way is to hear all the evidence, and then to instruct the jury, according to the nature of the case, and the extent of the injury is also a fact for the jury.

IN ACTION FOR INJURY TO LAND FROM DEPOSITS OF SAWDUST, defendant is liable only for the deposit made by him; if others have contributed to the deposit, he cannot be held liable for their injury, but his deposit must be separated by the best proof the nature of the case affords, and his liability ascertained accordingly.

THE opinion states the case.

Harding, Minor, and Seely, for the plaintiffs in error.

Waller and Dimmick, for the defendant in error.

By Court, AGNEW, J. In general, the rule for the measure of damages in cases of tort may be said to be that which aims at actual compensation for the injury; and whatever ascertains this is proper evidence to be submitted to the jury: *McKnight v. Ratcliff*, 44 Pa. St. 168; *Douty v. Bird*, 60 Id. 48; *Forsyth v. Palmer*, 14 Id. 98 [53 Am. Dec. 519]; *Hart v. Evans*,

8 Id. 22; *Walker v. Smith*, 1 Wash. C. C. 154; *Bussey v. Donaldson*, 4 Dall. 206. There are qualifications, however, as that inadvertent or unintentional injuries, or acts unaccompanied with malice draw after them only their direct and immediate consequences, and not those remote and speculative, while grossly negligent or malicious acts may be the subject of larger damages. In the former, the damages are merely compensatory; but in the latter, they rest in the sound discretion of the jury, uninfluenced by prejudice or passion. Damages for injuries to property vary also according to the nature of the claimant's right. The owner of the freehold may undoubtedly recover for an injury which permanently affects or depreciates his property; while a tenant, or one having only a possessory right, may recover for an injury to his use or enjoyment of it: *Ripka v. Sergeant*, 7 Watts & S. 9 [42 Am. Dec. 214]; *Schnable v. Koehler*, 28 Pa. St. 181; *Robb v. Mann*, 11 Id. 305 [51 Am. Dec. 551]; *Williams v. Esling*, 4 Id. 486 [45 Am. Dec. 710]. The court below erred, therefore, in confining the proof of damages of the plaintiffs to the mere use of the water. Being the owners of the property, as well as in its actual possession and use, they had a right to all the damages flowing directly from the tort of the defendant. If, therefore, a permanent injury was created by the lodgment of the tan-bark in the pool of their dam, which actually depreciated the property in value as a water-power, it must affect the price or value of the land to which it belonged; and why should this not be compensated in damages? It is difficult to give a good reason against it. The plaintiffs in that case have lost just so much in the value of their property by the illegal act of the defendant. Compensation for the diminished enjoyment or use of the property for a certain number of years is no compensation for the diminished value of the estate itself. The profit of the land must not be confounded with the land itself. If the land were under lease, an injury which diminished its annual profit to the tenant, and also depreciated the value of the property itself, would be the subject of a double action, in which the tenant and the landlord would each recover the amount of his own loss. Of course, when an owner claims in both capacities he cannot be allowed a double compensation for the same loss; so that the damages for use must not represent in any part the damages for the permanent injury. It is the duty of the court to see that one does not overlap the other.

We think the court erred also in refusing to admit both

methods of computing the permanent damages, to wit, that which measures the damages by the different values of the land, with and without the deposit; and that which measures them by the cost of removing the deposit. It is often difficult for a court to determine the true measure until all the evidence is in. It may turn out that the cost of removing the deposit in a certain case would be less than the difference in the value of the land, and then the cost of removal would be the proper measure of the damages; or it may be that the cost of removal would be much greater than the injury by the deposit, when the true measure would be the difference in value merely. If there be different modes of measuring the damages, depending on the circumstances, the proper way is to hear the evidence, and to instruct the jury afterwards according to the nature of the case. The argument of the defendant in error is, that the injury is only temporary, the tan-bark being light and removable by freshets. But this assumes the fact. The plaintiffs declared upon the deposit as an injury to their freehold, alleged it to be permanent in its character, and offered evidence to this effect. The fact was one to be decided by a jury; but in assuming that the injury was only to the use of the property for a certain period of time, the court withdrew the fact of permanency. If the deposit was of a temporary character it was the subject of proof, and the defendant's right to an instruction to the jury to confine the damages to the use during its temporary existence depended on the finding of the fact. The extent of the injury was also a fact for the jury. Whether temporary or permanent, the defendant is liable only for the tan-bark cast into the stream by him, which found its way into and lodged in the pool of the dam. If others above on the stream contributed to the deposit of tan-bark or other matter in the pool, the defendant cannot be held liable for their injury, but his deposit must be separated by means of the best proof the nature of the case affords, and his liability ascertained accordingly. This point has been discussed and decided at January term, 1888, in the case of *Little Schuylkill Nav and Railroad and Coal Co. v. Richards's Adm'r*, 57 Pa. St. 142, from Schuylkill County.

Judgment reversed, and a *venire facias de novo* awarded.

MEASURE OF DAMAGES IN ACTION FOR TORT is compensation for the injury received: *Worcester v. Great Falls Mfg. Co.*, 86 Am. Dec. 217, and note.

LIABILITY FOR WRONGFUL ACT EXTENDS only to the damages arising from the proximate and natural consequences of the act: *Harrison v. Berkley*, 47 Am. Dec. 578; *Worcester v. Great Falls Mfg. Co.*, 66 Id. 217, and note.

EXEMPLARY DAMAGES MAY BE AWARDED in cases of willful malice: *Peoria Bridge Ass'n v. Loomis*, 71 Am. Dec. 263, and note.

FOR INJURY TO PROPERTY SUSTAINED WHILE UNDER LEASE, the tenant may recover damages for the injury to him, and the owner may recover for the damages done to the land: *McConnell v. Kibbe*, 85 Am. Dec. 265.

WHEN CASE ADMITS OF IT, RESORT MAY BE HAD TO DIFFERENT MEANS of estimating the damages, these to be judged by the jury under proper instructions, when necessary to aid them in determining the amount of loss sustained in consequence of the injury: *Rogers v. Bemus*, 69 Pa. St. 436, citing the principal case.

THOUGH DIFFICULTY OF SEPARATING DAMAGE from each independent cause may be great, still it does not change the nature of the tortious act nor change nor relieve defendant from his liability for his portion of the damages: *Gould v. McKenna*, 86 Pa. St. 303, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Bare v. Hoffman*, 79 Pa. St. 77, and cited as not being in point in *Huddleston v. Borough of West Bellevue*, 111 Id. 123.

BROOKS AND ORME v. COMMONWEALTH.

[61 PENNSYLVANIA STATE, 352.]

WHERE FELONY HAS BEEN COMMITTED AND FRESH PURSUIT IS MADE by a private citizen and the owner of the stolen goods on reliable information of the felony, and the felons when overtaken are informed of the felony, that they are believed to be the perpetrators, and that they must return under arrest, but before either is seized one rids himself of the stolen property, whereupon they kill the pursuer, the killing is murder, and not manslaughter.

WHEN PRIVATE CITIZEN SEEKING TO MAKE ILLEGAL ARREST is killed by the pursued, the crime is not necessarily manslaughter. This depends on whether the killing was without malice, and arose solely from a sudden heat and passion upon the illegal arrest; if it was prompted by wickedness of heart and consciousness of guilt which determined the pursued to escape at the cost of an innocent life, the killing is murder.

TO REDUCE KILLING TO MANSLAUGHTER, it must be shown that the party doing it was justly provoked and transported by passion, ungovernable, and deaf to the voice of reason, and the cause which produces this frame of mind must be reasonable, and bear a just proportion to the effect.

TO REDUCE KILLING TO MANSLAUGHTER, all circumstances must lead to the conclusion that the act done, though intentional, was not the result of cool, deliberate judgment and previous malignity of heart, but solely imputable to human infirmity.

ILLEGAL ASSAULT WILL NOT REDUCE KILLING TO MANSLAUGHTER, when the revenge is disproportionate and barbarous.

CRUEL AND UNUSUAL BEATING UPON SLIGHT PROVOCATION producing death is murder by express malice, though the killing was not intended, if from

the weapon used or circumstances it is shown that great bodily harm was intended.

UPON COMMISSION OF FELONY, PRIVATE PERSON making fresh pursuit on reliable information may arrest the felon, or on probable suspicion he may arrest the felon or person suspected, but on suspicion of felony merely he cannot break open a house or kill the suspected person.

PRIVATE PERSON (AND A FORTIORI PEACE OFFICER) present when a felony is committed is bound to arrest the felon on pain of fine and imprisonment if he escapes through negligence, and they may justify breaking open doors; and if they kill him, provided he cannot be otherwise taken, it is justifiable; though if they are killed in trying to make the arrest, it is murder.

UPON COMMISSION OF FELONY, arrest may be justified by any person without warrant; and if an innocent person is arrested upon suspicion by a private citizen, the arrest is excused if felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed the arrest is illegal, though an officer would be justified if acting upon reliable information from another.

WHEN FELONY HAS BEEN COMMITTED, or upon probable suspicion, a private person may arrest the felon without warrant, first giving notice of his purpose, but the felony must be proved to justify the arrest.

LARCENY WILL JUSTIFY ARREST BY PRIVATE CITIZEN.

WHERE PRIVATE CITIZEN SEEKS TO ARREST an innocent party and is killed, the killing is manslaughter.

THE opinion contains the facts.

Burnett, Strong, Storm, and Lee, for the plaintiffs in error.

S. Holmes, Jr., and Davis, for the commonwealth.

By Court, AGNEW, J. Thomas Brodhead kept the Brainerd House in Dutotsville, Monroe County. On the 25th of September last, returning home, he was informed that his bar-drawer had been robbed by two men, who had left a very short time before. With his brother, Theodore Brodhead, he started in pursuit of the thieves, and overtook them within a mile from home. When he came up he told them they must go back with him, that his bar had been robbed, and they were supposed to be the men. Brooks said he would go back; Orme refused. Thomas took Orme by the arm and told him he must go back too. Theodore Brodhead then came up. Brooks took money from his pocket and tried to throw it over a wall. A two-dollar bill fell near to Thomas, who let go of Orme to pick it up. While in the act, he heard Theodore cry out, "Don't you shoot." Looking up he saw Brooks aiming a pistol at Theodore's head, and cried out, "You'd better not shoot." In an instant Brooks turned his pistol on Thomas and fired, and then wheeled upon Theodore and shot him down; Orme at this time crying out to Brooks, "Shoot them both down

as soon as you can." Theodore was shot through the heart, and Thomas struck in the side, the ball glancing from a bundle of papers in his pocket. Thomas, much hurt, attempted to escape, followed by Orme, who fired at him, the ball grazing his forehead. Thomas turned instantly, clasped Orme around the arms, and a scuffle ensued, Orme firing several shots at him, which missed. Orme called to Brooks for help, telling him to take a stone and knock out Thomas's brains. Brooks first struck him several blows with his pistol, and then took up a stone and beat him over the head and face, cutting and gashing him severely. Finally overpowered, Thomas sunk down, and the prisoners fled. They were followed, caught, and identified. These are the bare facts, stripped of superfluous statement. Thus a felony was committed; the prisoners were the felons; fresh pursuit was made by the owner of the stolen money, on reliable information of the felony. The felons when overtaken were informed of the felony, that they were believed to be the perpetrators, and told they must return, before either was taken hold of, and one began immediately to rid himself of the stolen money. On this state of facts, the prisoners' counsel asked the court to charge the jury that Theodore and Thomas Brodhead, not being public officers, but private citizens, had no authority to arrest them; that the arrest was illegal, and the killing of Theodore was not murder, but manslaughter. The court declined so to charge.

It is a sufficient answer to say that the point required the court to take the facts from the jury, and pronounce the crime manslaughter only. But if the arrest were illegal, it does not follow that the crime was necessarily manslaughter. There remained still the question on the evidence whether the killing was without malice, and arose solely from a sudden heat and passion upon the illegal arrest. The killing was evidently not the result of anger and hot blood growing out of an unwarranted assault on the persons of the prisoners. It was prompted by wickedness of heart and a consciousness of guilt which determined the prisoners to escape, even by the sacrifice of innocent lives. It was violent, heartless, cruel, and unnecessary, the pursuers having done no violent or dangerous act, and showing no arms or intention to injure. The killing was evidently malicious,—that is, the result of depravity of heart, and a cruel and wicked disposition. It was murder (whether of the first or second degree is not material to the present question), and it was not manslaughter. The indulgence which

the law shows in cases of manslaughter is to the weakness of human nature, not its wickedness. It looks upon men as they are, the creatures of natural impulses, and when justly provoked and transported by passion, ungovernable, and deaf to the voice of reason. But the cause which produces this frame of mind must be reasonable, and bear a just proportion to the effect. Therefore, says Sir William Russell, in his work on crimes, volume 1, page 514, "the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of; which he feels and resents at the instant the fact which he would extenuate is committed. All the circumstances must lead to the conclusion that the act done (though intentional of death or great bodily harm) was not the result of a cool, deliberate judgment and previous malignity of heart, but solely imputable to human infirmity." Hence an illegal assault will not reduce the crime to manslaughter where the revenge is disproportionate and barbarous: *Id.* 516, 517. And if on any sudden provocation of a slight nature one beats another in a cruel and unusual manner, so that he dies, it is murder by express malice, though the other did not intend to kill him: *Id.* 517, 518. He lays down this summary: "In all cases of slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstances, that the party intended to kill or do some great bodily harm, such homicide will be murder": *Id.* 520; see, to the same effect, Wharton's *Crim. Law*, sec. 971. The court therefore properly left this case to the jury upon the evidence, under competent instructions as to the nature and degrees of the crime of murder, and the nature of manslaughter.

But it is proper we should express our views upon the right of arrest. That on the commission of a felony a private person making fresh pursuit on reliable information may arrest the felon, is the law, not only of England, but of this state. The English law is thus stated in 4 *Bla. Com.* 293: Any private person (and *a fortiori* a peace officer) that is present when any felony is committed is bound by the law to arrest the felon on pain of fine and imprisonment if he escapes through the negligence of the standers-by. And they may justify breaking open the doors upon following such felon; and if they kill him, provided he cannot be otherwise taken, it is justifiable; though if they are killed in endeavoring to make such arrest, it is murder. Upon probable suspicion, also, a private person may arrest the felon or other person so suspected. But upon

suspicion of felony only, he cannot break open a house or kill the suspected person. To the same effect, see 1 Chitty's Crim. Law, 17; 1 Russell on Crimes, 593. In New York, Chief Justice Savage stated the law thus: "If a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on": *Holly v. Miz*, 3 Wend. 353.

In Pennsylvania the point was made in *Wakely v. Hart*, 6 Binn. 318, decided in 1814, that the common law had been altered by the constitution, which, in the seventh section of the ninth article declares "that the people shall be secure in their persons, houses, papers, and possessions, from unreasonable arrests; and that no warrant to search any place, or seize any person or thing, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation." It was argued that no arrest is lawful, without a warrant issued on probable cause, supported by oath. But it was held that this provision was to prevent the abuse of the warrant of arrest by forbidding it from being issued without good cause, or in a vague and uncertain form, and Tilghman, C. J., proceeds to say: "It is nowhere said that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery must be arrested on the spot or suffered to escape. So, although not seen, yet if known to have committed a felony, and pursued without warrant, he may be arrested by any person. And even when there is only probable cause of suspicion, a private person may, without warrant, at his peril, make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law essential to the welfare of society, and not intended to be altered or impaired by the constitution." To this it should be added that a private person, in making an arrest, must give notice of his purpose to arrest for the felony. This is the settled law, and was recog-

nized by Gibson, C. J., in *Russell v. Shuster*, 8 Watts & S. 309; see also *Commonwealth v. Deacon*, 8 Serg. & R. 49.

It is argued that larceny is not such a felony as justifies arrest. The force of this distinction is not discernible. Though sometimes a light offense, it is often grave and important in its consequences. A loss which would be grievous to a poor man, and enlist all his energy in the pursuit, might scarcely be felt by one who is rich. To tell the former that his right to seize the felon and bring him to justice, and thus recover his property, depends on the amount in value, would only mock his earnestness and condemn the law.

It is also said that arrest by a private person is contrary to the genius of our institutions, and is the relic of a barbarous age. But the reverse is the case in a republic, where the people themselves represent its sovereignty and its security. The felon is an enemy to that sovereignty and security, forfeits his liberty, and cannot complain that the hand of his fellow-man arrests his flight, and returns him to justice. What title has he to immunity from the law which he has violated, and to be permitted to escape its penalty, because the officer of justice is not at hand to seize him? He has broken the bond of society; he has dealt a blow at its welfare and security; and he has placed himself in open hostility to all its faithful members, whose duty it becomes to bring him to justice. We speak of the known felon. It is a misapplication, which applies the guards of the constitution and the sacred principles of a just and well-regulated liberty to his case. The harmless citizen stands upon a different footing, and a private person arresting him does it at his peril; and if killed, the crime is only manslaughter. The distinction is founded in nature, and its reason is clear.

An innocent man is unconscious of guilt, and may stand on his own defense. When assailed under a pretense which is false, his natural passion rises, and he turns upon his assailant with indignation and anger. To be arrested without cause is to the innocent great provocation. If in the frenzy of passion he loses his self-control and kills his assailant, the law so far regards his infirmity that it acquits him of malicious homicide. But this is not the condition of the felon. Conscious of his crime, he has no just provocation,—he knows his violation of law, and that duty demands his capture. Then passion is wickedness, and resistance is crime. Neither reason nor law accords to him that sense of outrage which springs into a

mind unconscious of offense, and makes it stand in defense of personal liberty. On the contrary, fear settles upon his heart, and when he uplifts his hand, the act is prompted by wicked hate and the fear of punishment. It has been said by an authority much older than our law that "the wicked flee when no man pursueth." A sense of guilt cannot arouse honest indignation in the breast, and therefore cannot extenuate a cruel and willful murder to manslaughter. We see no error, therefore, in the answer of the court to the third point. Finding no merit in the error assigned, we deem it unnecessary to pass upon the question whether a bill of exception was necessary to be sealed.

The sentence of the court is affirmed, and the record is remitted for further proceeding according to law.

THOMPSON, C. J. I fully concur in the reasons of my brother Agnew for affirming the judgment in the court below on the very points presented and argued. To that portion relating to private arrests, I am not prepared to assent, nor yet fully to dissent, but I concur in the result determined on.

ARREST OF CRIMINAL BY PRIVATE CITIZEN: See note to *Hawkins v. Commonwealth*, 61 Am. Dec. 154-164, treating the questions discussed in the principal case. And see also *Eanes v. State*, 44 Id. 291, 293, as to illegal arrests, and arrests without warrant by private persons.

MANSLAUGHTER, WHAT IS, and what will reduce killing to: *Maher v. People*, 81 Am. Dec. 781, and note 791.

HOMICIDE ATTRIBUTED TO REVENGE, and punished as murder, when: *State v. Shippey*, 88 Am. Dec. 70, and note 75.

HOMICIDE COMMITTED IN RESISTING ILLEGAL ARREST is manslaughter: *Roberts v. State*, 55 Am. Dec. 97.

DANKEL v. HUNTER.

[61 PENNSYLVANIA STATE, 382.]

CONTRACT BY HUSBAND AND WIFE TO SELL LAND—SPECIFIC PERFORMANCE.—Husband and wife contracted in writing to sell certain real estate belonging to the wife, and the wife's separate acknowledgment was taken to the agreement: *held*, that a court of equity had jurisdiction to entertain a bill by the vendee for specific performance.

MARRIED WOMAN HAS CAPACITY TO CONTRACT FOR SALE OF HER REAL ESTATE, and to convey it in the precise statutory method conferring the power.

BILL for the specific performance of a contract to sell land. The opinion states the case.

Edward Harvey, for the appellant.

John D. Stiles, for the appellee.

By Court, READ, J. This is an appeal from the decree of the common pleas of Lehigh County, dismissing a bill for specific performance, brought by the plaintiff against a married woman and her husband, on a contract for the sale of certain real estate belonging to her in the city of Allentown. The bill was demurred to, and an answer was also filed, but it was heard on the demurrer, and dismissed.

The bill sets forth that Mrs. Hunter was seised in fee-simple, as her own separate estate, of the premises described in paragraph No. 1, and that she and her husband, on the 3d of December, 1867, entered into an article of agreement with the plaintiff, by which they agreed to grant, bargain, and sell to the plaintiff the said premises, for which he agreed to pay to the said defendants the sum of \$5,500, in manner following, to wit: \$275 at the execution of the agreement, and the balance, to wit, \$5,250, at the execution and delivery of the deed, to wit, on the first day of April, A. D. 1868; in part payment of which the said defendants agreed to accept a certain judgment against third persons for \$3,500, which payments shall be guaranteed by Jesse M. Lone and the plaintiff; that the separate acknowledgment of Mrs. Hunter was taken to this agreement, and that on the said 3d of December the said \$275 was paid to the said Sarah Hunter, and that the balance of the consideration money was at the time stipulated tendered and a deed demanded, and that the defendants refused to accept the tender, and also refused to execute and deliver to the plaintiff a deed for the premises.

There being no opinion of the judge filed, we are obliged to take the questions as presented by the counsel of the appellant.

1. We entertain no doubt that the court had jurisdiction.

2. If this had been a deed of conveyance executed and acknowledged by the defendants, as this article of agreement was, there can be no doubt that it would have passed the title of Sarah Hunter and her husband to the premises contained in it. The objection to the contracts of married women for the sale of the real estate has been, that they were not executed according to the provisions of the statute. In some cases they were merely verbal, in others that the husband was not a party, in others that there was no separate acknowledgment of the wife. Here all the forms and requisites of the

statute were complied with, and the only objection is, that it was only a contract to convey, and not a conveyance of the land. In *Glidden v. Strupler*, 52 Pa. St. 400, my brother Agnew has put the whole question in a single sentence: "A married woman has no capacity to contract for the sale of her real estate, or to convey it, except in the precise statutory mode conferring the power." The converse of this is the law, —a married woman has capacity to contract for the sale of her real estate, and to convey it in the precise statutory method conferring the power.

In *Crofts v. Middleton*, 25 L. J. Ch. 533, as stated in Fry on Specific Performance, 72, it is said: "It is to be added that, with regard to real estate, a married lady may, under the act for the abolition of fines and recoveries, not only dispose of the land, but contract respecting it, if not so as to render herself liable to damages, yet so as to bind her estate of inheritance."

As this case will go back for further proceedings, we desire to say we only decide that the court has jurisdiction, and that the statutory execution of the contract was in due form; but we decide nothing as to the validity of the contract, or of the tender and its form, nor as to any of the allegations contained in the answer which has been sent up with the demurrer.

Decree reversed, and record remitted, with directions to proceed in due order.

CONVEYANCE OF WIFE'S REAL ESTATE—JOINDER OF HUSBAND: See *Scovil v. Kelsey*, 95 Am. Dec. 415; *Stevens v. Parish*, 95 Id. 636, and note 640; *Harrod v. Myers*, 76 Id. 409.

CONVEYANCES BY WIFE TO BE STRICTLY CONSTRUED TO PROTECT HER RIGHT: *Sharp v. Bailey*, 81 Am. Dec. 489.

CONVEYANCE OF MARRIED WOMAN NOT IN CONFORMITY WITH STATUTE IS GENERALLY INVALID: *Morrison v. Wilson*, 73 Am. Dec. 593, and note 599; see *Kirkpatrick v. Buford*, 76 Id. 367-401, and extended note giving abstract of American statutes upon the subject.

THE PRINCIPAL CASE IS CITED to the doctrine "that if the consideration money has not been paid, the vendee, unless it plainly appear that he has agreed to run the risk of the title, may defend himself in an action for the purchase-money, by showing that the title was defective, either in whole or in part, whether there was a covenant of general warranty or of right to convey or quiet enjoyment by the vendor or not, and whether the vendor has executed a deed of conveyance for the premises or not," in *Wilson's Appeal*, 109 Pa. St. 609; and is distinguished in *Berk's Appeal*, 75 Id. 146, in which case the wife had not said or done anything compelling her to unite in the fulfillment of her husband's contract. She had not executed and duly acknowledged any written instrument by which she was bound, as the wife had done in the principal case.

BABCOCK v. CASE.

[61 PENNSYLVANIA STATE, 427.]

WHERE OWNER OF TAX TITLE TO LAND SELLS IT representing it to be good, and the purchaser relies upon such representations, a relation of trust is created between the parties, which compels the vendor to exhibit the truth of the case as it exists whether he knows it or not; and his ignorance of the truth, having undertaken truly to state it, will not redeem a falsehood regarding the title, in any material matter, from being a fraud which will avoid the sale.

RESCISSON OF EXECUTED CONTRACT ON GROUND OF FRAUD, failure of consideration, and the like, is a right in equity, subject to a restoration of the consideration. In such case, the party seeking equity must do equity; he must return the property obtained, or reconvey the title, and a failure in this particular will be followed by a denial of equity. But if the thing the consideration for which is sought to be recovered is entirely worthless, there is no duty to return it, in order to entitle plaintiff to recover.

WHERE CONTRACT IS SOUGHT TO BE AVOIDED on the ground of fraud or failure of consideration, if any value appears to attach to defendant's title, a condition to reconvey in the verdict will do equity; and if after verdict it should appear that a reconveyance ought to be made, the court may restrain execution until it is made.

THE opinion states the facts.

Wetmore, Wilbur, and Allen, for the plaintiff in error.

Brown, for the defendant in error.

By Court, THOMPSON, C. J. The plaintiff in error, Babcock, sold the land which gave rise to this controversy to the defendant in error, at the distance of some thirty-five or forty miles from its alleged location. There was testimony to show that he represented the title as good; that it was a tax title; that he had bought from Mr. Falconer, and had been to Tide-out, where the land lay, and looked it up, and found it all right. Of course, this was equivalent to saying that the land was unseated, and subject to be sold for taxes at the time the taxes for which it was sold had been last assessed. There was also testimony that the defendant in error said, if he bought the land, he would have to take his (Babcock's) word for it that the land and title were as he represented, and that on these terms the sale took place. The jury believed this evidence, and found against the defendant below, on the ground that he misrepresented the true state of the land, when he was bound in good faith to represent it exactly as it was, the plaintiff below declaring himself a stranger to it, and relying on his representations. Under such a state of facts, there was a relation of trust and confidence between the parties, and the

seller was bound to exhibit the truth of the case as it existed, whether he knew them or not. That is to say, his ignorance of them, having undertaken truly to state them, would not redeem a falsehood in regard to them, in any material matter, from being a fraud, and a fraud that would avoid the contract. All this was sufficiently explained to the jury by the learned judge below.

The plaintiff's case below depended on showing the worthlessness of the defendant's conveyance. This he succeeded in doing. But it is alleged that the plaintiff was not entitled to try that question until after a reconveyance made or tendered to the defendant.

As a general rule, in the cases of executed contracts, this is true. Rescission on the ground of fraud, failure of consideration, and the like, is a right in equity subject to a restoration of the consideration; consequently, in order to obtain equity, it lies on the party seeking it to do equity; that is to say, he must return the property obtained, or reconvey the title. If this be the equitable requirement, a failure in that particular would ordinarily be followed by a denial of the equity demanded. But if the thing, the consideration for which is sought to be recovered back, be entirely worthless, there would be no duty to return it. This we held in *Flynn v. Allen*, 57 Pa. St. 482, a case from Potter County. We decided that the return of the worthless township orders bought by the plaintiff from the defendants was not essential to the plaintiff's right of recovery. As nobody can have an equity in a thing worthless in itself, it must follow that the restoration of such a thing will not be required in equity. Wherever the question of restoration arises, it is an equitable question, and is to be dealt with on equitable principles. If there be no value in a conveyance, for instance, and no right of recourse on any one on a reconveyance, would the want of such a reconveyance having been tendered outweigh a plaintiff's equity to have his money back, who had been egregiously defrauded? If it would not, a reconveyance would not be required. It is only required in order to prevent the party holding the thing paid for, and recovering the price, also, that a return is essential in equity. If the thing be worth nothing, of what consequence is a reconveyance or return of it?

The defendant below did not show that a reconveyance by the plaintiff to him would be of any value. What equity had he to have it, therefore? It must be remembered that if the

plaintiff was defrauded, it avoided the conveyance, and his right was complete to his money. It never lawfully passed out of him. The right to have it again depended on what might appear in the defense. He could not know that the defendant would insist on a reconveyance of a worthless title, and was not bound to make a reconveyance, or tender one. If any value appeared in it, however, a condition to reconvey in the verdict would effectually do equity in the premises. Indeed, after verdict, if it should come to light that a reconveyance ought to be made, it is within the equitable power of the court to restrain execution until it be made. In all cases, therefore, the equity of the defendant is to be judged of and administered, if it be an equity at all, and if it be not, the claim goes for nothing. If equity requires a reconveyance to precede suit, it will be so administered; if it can be protected on the trial as it may in almost every possible case, it will be so administered. If there be no equity in the case, but only an assumption of it, it ought to be disregarded. That was the category, it seems to us, in which the defendant's claim to equity stood. Should the court below be of opinion, however, that justice demands a reconveyance to be made to the defendant, it might restrain the execution until it be made.

The action is at common law, but still it is an equitable action; contemplating it in this light, the rights and duties of the parties are more easily perceived, and as they strike us we have stated them. We do not impinge on the case of *Pearsoll v. Chapin*, 44 Pa. St. 12. That case was well decided on its facts. We think there was, therefore, no error in the ruling of the learned judge upon the defendant's first and second points.

Nor do we consider there was error in the answer to the third point of the defendant. It was true in law, if the fact were so, that if there was no land unseated to which the treasurer's deed was applicable, the conveyance may have been regular, but it operated on nothing. The court committed no error in telling the jury so. It was their business to say how the fact was, and they have said so. The other branch of the point was affirmed.

There are several errors to which no arguments were addressed, but we have considered them, as requested in the oral argument, and see nothing whatever to correct in the rulings of the learned judge in regard to them.

It was proposed to prove on the part of the defendant that

the price at which the land was sold was so inadequate to its value, if oil territory, that an inference ought to have been drawn by the jury that the plaintiff took the risk of the title. Such was by no means a legitimate inference. It was not known to be oil territory, and the risk of this may have been the inducement to offer it at so low a figure. The testimony would be ineffectual, unless it would raise a presumption contrary to the express facts, and sufficient to overturn them, as proved by the witnesses, that the defendant represented the title as good, and he knew it, and that the plaintiff said he would rely on his word and take it. The proposed testimony was susceptible of other inferences, and not necessarily those claimed,—in fact, not possible, in view of the evidence in the case. There was no error therefore in this, nor in any other part of the case, and the judgment is affirmed.

CONTRACT FOR SALE OF LAND is void when the vendee has relied upon false representations made by the vendor as to the title: *Brown v. Manning*, 74 Am. Dec. 736, and note 739; and misrepresentations as to title innocently made will entitle the vendee to rescind the contract: *Rimer v. Dugan*, 77 Id. 687, and note.

PURCHASER, TO RESCIND CONTRACT OF SALE, must put vendor, or offer to put him, in the same situation he was in before the delivery of the property: *Hynson v. Dunn*, 41 Am. Dec. 100; *Duncan v. Jeter*, 39 Id. 342, and note.

RESCISSION OF CONTRACT FOR SALE OF LAND on ground of fraud: *Lester v. Mahan*, 60 Am. Dec. 530, and note; *Brown v. Manning*, 74 Id. 737, and note 739.

IN ACTION FOR RESCISSION OF CONTRACT FOR PURCHASE of land, notice of rescission, and an offer to return the property, is necessary, so as to put the vendor *in statu quo*, unless his title is entirely worthless, when there is no duty to return it: *Beetern v. Burkholder*, 69 Pa. St. 253; *Morrow v. Rees*, 69 Id. 373; and if such title proves to be worth anything, provision can be made in the verdict for its return: *Cooper v. Bushley*, 72 Id. 257. The reconveyance or return of the property is only required to prevent the vendee from holding the thing paid for, and recovering the price: *Burns v. McCabe*, 72 Id. 314, all citing the principal case.

NOTHING BUT FRAUD, MISTAKE, OR TURPITUDE of consideration will justify the rescission of an executed contract for the sale of land: *Stephen's Appeal*, 87 Pa. St. 207, citing the principal case.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

GRAHAM v. PIERCE.

[19 GRATTAN, 28.]

EVERY TENANT IN COMMON IS ENTITLED TO POSSESS, USE, AND ENJOY the common property, without accountability to his co-tenants for rents or profits, except as provided by statute, for so much as he may receive beyond his just share or proportion.

TENANTS IN COMMON ARE NOT BOUND TO USE COMMON PROPERTY JOINTLY, by means of a partnership between them, but may possess, use, and enjoy the common property severally, accounting to their co-tenants for as much of the rents and profits as they may receive beyond their just share and proportion.

WHERE TENANT IN COMMON USES COMMON PROPERTY TO EXCLUSION OF HIS CO-TENANTS, or occupies and uses more than his just share or proportion, the best measure of his accountability to his co-tenants is, as a general rule, their shares of a fair rent of the property so occupied and used by him. But peculiar circumstances may exist, making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common, as in the case of a tenancy in common in lead mines; and in such case, in settling the accounts of the occupying and operating tenants, each should be charged with all his receipts and credited with all his expenses, including those for necessary improvements, on account of the operation of the mine.

TENANT IN COMMON WHO OCCUPIES AND USES COMMON PROPERTY SEPARATELY CANNOT BE HELD to account to his co-tenants for destruction or waste, unless the bill sufficiently charges it.

AMENDING AND AFFIRMING DECREE. — A commissioner, in settling the accounts of the parties, reported a sum due from the plaintiffs to the defendant, and then added, "The complainants will hereafter render an account of a remnant of the business still left in their hands." Both parties excepted to the accounts as stated, but the court overruled all the exceptions, confirmed the report, and rendered a final decree in favor of the defendant. *Held*, that since it was not probable that the further

account referred to by the commissioner would lessen the amount due the defendant, and in the absence of any other error, the appellate court could amend the decree by providing for the further account, and affirm it as thus amended.

BILL for partition and for the settlement of accounts between tenants in common. The bill was filed in February, 1854, by Graham and thirteen other persons, partners under the name of the Wythe Union Lead Mines Company, against Alexander Pierce and one Chaffin; and it alleged that the plaintiffs were owners of fourteen sixteenths of valuable lead mines, and that the remaining two sixteenths belonged to Pierce and Chaffin; and that the property was incapable of division without greatly impairing its value. It appeared that the plaintiffs formed the partnership under the name above mentioned in February, 1848, to continue until February, 1858, for the purpose of mining and manufacturing lead; that they had proposed to the defendants to join them, but that Pierce refused to do so, and took possession of a part of the land, and proceeded to carry on the manufacture and sale of lead separately, but in such manner as to do great injury to the property, as claimed by the plaintiffs, and particularly set out in the opinion. Chaffin stood aloof, taking no part in the business. The bill prayed that an account be directed of the operations of Pierce in the said manufacture of lead, from the commencement of his business in February, 1848, to the time of filing the bill; that in taking said account the commissioner be directed to ascertain what amount of lead he had made, and at what average price per ton; what profits had been derived therefrom, and to whom they rightfully belonged; also what profits had been realized by Pierce during the same time, from a mercantile establishment which had been carried on by him in connection with the making of lead at the mine, and any other account necessary to show the liability of Pierce to the owners of the joint property, growing out of his operations at the said mines; and that all the joint owners may be decreed their just proportion thereof. There was also a prayer for partition, if upon the final hearing this should seem advisable. Pierce alleged in his answer that he was obliged to make large expenditures for sinking shafts, building furnaces, etc., all of which became fixtures on the estate, and claimed that such expenditures, out of his own means, were a proper charge against the receipts of the proceeds of lead; he also claimed that the profits of the store

were his own, made by his own means. He insisted that the plaintiffs should account to him for his share of the profits of manufacturing lead made by them, alleging his readiness to account for rent and profits, after deducting from the gross receipts all his expenses in putting up fixtures, etc., cost of manufacture, transportation, and sale; and asking that whatever sum is due him from plaintiffs be set off against what is due from him to them. On the day before the answer of Pierce was filed, he and the plaintiffs entered into an agreement which, together with its bearing on the case, appear in the opinion. A commissioner was appointed to take an account of the manufacture and sale of lead by the plaintiffs and by the defendant Pierce from and after the 17th of February, 1848. He took the account as directed, from the date mentioned to the 17th of February, 1857, and reported as due from the plaintiffs to Pierce \$2,587.91. All the parties excepted to the report, but the court overruled all the exceptions, and confirmed the report. The plaintiff's exceptions, and the other facts material to an understanding of the case, appear in the opinion.

William Daniel, for the appellants.

Staples and Johnston, for the appellee.

By Court, MONCURE, President. The court is of opinion that every tenant in common has a right to possess, use, and enjoy the common property, without being accountable to his co-tenants for rents or profits, except under the statute for so much as he may receive beyond his just share or proportion: Code, p. 586, c. 145, sec. 14. And although it may be best for the interests of all the tenants in common to use the common property jointly, by means of a contract of partnership between them, yet the individual owners have a right to decide that question for themselves, and are not bound to enter into such contract of partnership, but may possess, use, and enjoy the property severally, accounting to their co-tenants for so much of the rents and profits as they may receive beyond their just share and proportion as aforesaid. Therefore the appellee, Alexander Pierce, was not bound to enter into copartnership with his co-tenants in the use and operation of the lead mines in question; but had a right to use and enjoy the property separately on the conditions aforesaid.

The court is further of opinion that although, as a general

rule, where one tenant in common occupies and uses the common property to the exclusion of his co-tenants, or occupies and uses more of the common property than his just share or proportion, the best measure of his accountability to his co-tenants may be their shares or proportions of a fair rent of the property so occupied and used by him, according to the principle laid down in the case of *Early v. Friend*, 16 Gratt. 21, 52 [78 Am. Dec. 649]. Yet, as was said in that case, "there may be peculiar circumstances in a case, making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common": *Id.*, p. 54; *Ruffners v. Lewis*, 7 Leigh, 720 [30 Am. Dec. 513]. Under the circumstances of this case, it was proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common. It is not a case of land used for agricultural purposes only, in which there is no difficulty in ascertaining a fair rent for use and occupation; nor is it such a case as that of *Early v. Friend*, *supra*, where the property consisted of salt-works, the yearly value of which might be ascertained with reasonable certainty, and where a money rent had been contracted for and paid to some of the tenants in common, which furnished a standard for ascertaining the amount due to others; but it is the case of a lead mine, the yearly value of which, and more especially of an undivided and uncertain portion of which, is incapable of ascertainment.

Nor would it be just, in settling the account of issues and profits, to charge the occupying and operating tenants with a certain sum per ton for the quantity of ore raised from the mine, nor to credit them with an estimated sum per ton for raising the ore and manufacturing the lead, as contended for by the appellants. Such a mode would be founded on conjecture merely, and would be very unequal and unjust, as it could not be known what would be the cost of raising ore, which would depend upon its situation in the mine, its degree of richness, and the facility or difficulty of getting at it, as well as upon the uncertain price of labor; nor what would be the cost of manufacturing lead, which would depend upon the varying price of labor and supplies. The best mode of settling such an account, and one which is perfectly just, supposing the tenant to have been capable and faithful, is to charge him with all his receipts and credit him with all his expenses, on account of the operation of the mine. This mode had been pursued by the owners of this mine prior to 1838, when sev-

eral operations were conducted by different owners, who accounted with the other tenants for their shares and proportions of the net profits. It was also pursued by them from 1833 to 1848, during which period they all operated in one partnership. The same course ought to be pursued in regard to the operations since 1848, which were conducted by the appellants and the appellee separately. They severally conducted their operations with the expectation of accounting for net profits with the other tenants in common, and kept their accounts accordingly. The agreement of the 9th of May, 1855, recognizes that mode of settlement as the proper one, and provides for the making of such a settlement. And the consent decree entered on the next day, the 10th of May, 1855, directs accordingly. The account was therefore properly settled in that mode.

The court is further of opinion that in settling the account of the appellee Pierce, the commissioner properly gave him credit for improvements made by him, and the circuit court therefore did not err in overruling the appellant's first exception to the report of the said commissioner. The said Pierce, having a right as tenant in common to occupy and operate the mine, had also a right to make such improvements as were necessary for that purpose, and to deduct the cost of such improvements from the proceeds of the operation. It does not appear that he made any improvements which were not necessary or were not of permanent value to the estate, or that he incurred any unnecessary expense in making them. All of them were necessary to his convenient occupation and use of the mine, except perhaps the small expense incurred in fixing up a building already on the land, for a store; and if it be true, as seems to be the case, that good management in conducting the operations of a mine requires that a store should be kept in connection with such operations, then the fixing of the storehouse was a proper improvement to be made and charged for in the account. But whether it was necessary or proper for the operation of the mine or not, it was a permanent improvement of the property, which inured to the benefit of all the owners, and the expense of making it is therefore properly chargeable to them in the account. Although the improvements which were already on the property when Pierce commenced his operations may have been, as alleged, "amply sufficient for the judicious and beneficial conduct of the business," yet those improvements, or nearly all of them, were in

the exclusive use of the appellants, and Pierce could not exercise his right as a tenant in common to occupy and use the mine without making other improvements which were necessary for that purpose. But it appears from the account of the appellants that a large amount was expended by them in making improvements after Pierce commenced his operations, which amount is charged in the said account, and was allowed by the commissioner. And it appears from the evidence that the improvements made by Pierce, or nearly all of them, have been actually used by the appellants since they became purchasers of Pierce's interest in the mine.

The court is further of opinion that the circuit court did not err in overruling the appellant's second exception to the commissioner's report, being "to the whole frame and principle of the report." Reasons have already been given to show that in this case it was not "the duty of the commissioner to fix a proper cash value per ton on the manufacture of lead," with a view of settling the account upon that basis, but to go "into a detailed statement and account of the transactions and expenditures" of the parties, with a view to a fair and just settlement between them on account of profits actually received. The chief complaint of the appellants is, that Pierce conceived and conducted his separate operations of the mine with a view to his own profit, and without any regard to the interests of his co-tenants in common; that he conducted a store in connection with his operations of the mine; that his plan was to turn the profits of the combined operation as much as possible in the channel of the store, the whole of the profits of which were his, and to divert them from the business of the mine, the profits of which he had to share with his co-tenants; that he charged a large profit upon everything furnished by him from his store, and only employed such hands as would consume all or most of their wages in living, requiring them to buy all of their supplies from him; that all of them were trifling, and none of them were worth their wages; and that the result of his operations of the mine has been to make a very small profit compared with the profit made by the appellants, whose operations they say were conducted on a different principle. If this complaint had been materially sustained by the proofs, it ought to have had an important effect on the result of the case; but we are of opinion that it is not. As to the remark of Pierce, to which one or two of the witnesses testify, that a small proprietor might make a large

quantity of lead, and make a profit on expenditures by selling goods, it does not appear when it was made, and it seems to have been a casual remark, not sufficient to indicate a fraudulent purpose on the part of Pierce to pursue such a plan. He had a right to keep a store in connection with his mining operations, as the appellants did in connection with theirs; and according to the testimony, it appears that it is conducive to the convenient and profitable operation of the mine to keep a store in connection therewith. He did not charge anything more for articles furnished from the store for use in his mining operations, or for the use of the hands, than he charged for similar articles sold by him to other customers, or than other merchants in the neighborhood charged for similar articles sold to their customers. And the commissioner, in settling his account, deducted the profits included in the charges for articles used in his mining operations, so as to place him and the appellants on the same footing in that respect, they having charged only cost for such articles used in their operations. If his hands were trifling, and their services not worth their wages, it does not appear that he did not employ the best he could procure, and it is not pretended that he employed more than were necessary to his mining operations, or that he paid them higher wages than were paid by the appellants for similar hands. The profits of his store were small, and much less than were the profits of the appellants' store during the same period.

As to the profits of his mining operations compared with those of the appellants, it is impossible to ascertain them from the materials in the record, as a large amount of ore extracted by him from the mine was turned over by him when he sold out to the appellants, and the proceeds of it have gone into their accounts, thus swelling their apparent profits, while the apparent profits made by him are reduced by the expense of raising the ore and partly manufacturing it. The appellants had the great advantage of being in possession of almost all the old improvements and fixtures, and proceeded to carry on their mining operations without interruption, and no doubt with experienced hands, while the appellee had to make new improvements, and probably employ new hands, and it was therefore a long time before he could commence his mining operations. He seems to have desired to do the best he could for the interest of himself and his co-tenants. Unfortunately, he and they conducted rival establishments, both in regard to

mining and merchandising; and still more unfortunately, the effect of this rivalry was to produce ill feeling between them, and to cause them to throw stumbling-blocks, instead of facilities, into each other's way. The natural fruit of all this was to involve them in angry and expensive litigation. But the appellants have no cause to complain of the appellee in this respect, and seem to have been, at least, as much in fault as he in bringing about these evils. The account between them may therefore be considered as balanced on that score. The necessary effect of rival establishments, even if they had produced no ill feeling nor conflict of action between the parties, would have been to reduce the profits of each by increasing the price of labor and supplies, and reducing the price of goods sold at the stores. The evil was greatly increased in this instance by the ill feeling and conflicts which were engendered by the rivalry between those parties. But as before stated, the appellants have no just cause of complaint on that ground.

The court is further of opinion that the circuit court did not err in overruling the appellants' third exception to the commissioner's report, "because he has not charged the defendant Pierce with the sum of \$920, the damages recovered against the complainants upon the dissolution of an injunction." The ground of this exception is, that these damages were allowed by the jury in lieu of profits which Pierce would have made but for the injunction; and as the profits would have belonged to all the tenants in common, so ought the damages. But we cannot tell what influenced the jury in allowing damages in the action brought by Pierce upon the injunction bond. We cannot presume that they intended to compensate, not only the loss which Pierce alone sustained by the injunction, but also the loss which the appellants themselves, who were in effect the defendants in the action, sustained by their own injunction. We cannot presume that the jury intended to allow damages, of which only one sixteenth would inure to the plaintiff in the action, while fourteen sixteenths would inure and be returned to the defendants themselves. The action, though in form *ex contractu*, was in substance *ex delicto*, and the evidence may have been such as to warrant the jury in allowing exemplary damages; in which case, of course, the defendants who did the wrong could have no right to participate in the benefit of the damages. Besides, we have no account in the case of the cost and expenses incurred by the plaintiff in prosecuting the action, or of the cost and expenses incurred

by him in the injunction suit, over and above the legal costs recovered against the other parties.

The court is further of opinion that the circuit court did not err in overruling the appellants' fourth exception, which is "to the allowance to Pierce for the amount of claim on George Earp of \$2,780, upon the ground that it was lost." Without reviewing the evidence in regard to this claim, it is enough to say that we do not consider it sufficient to show that the claim was lost by the negligence of Pierce. On the contrary, we think it shows that the claim was not lost by such negligence.

The court is further of opinion that the circuit court did not err in overruling the appellants' fifth and last exception, which is to the allowance of the salary, board, etc., of agents employed by Pierce. The ground of this exception is that these agents were employed as well about the individual business of Pierce as in his mining operations. But the salary of only one agent during the period of those operations is allowed by the commissioner, and it appears that at least one agent was necessary, and was employed in those operations during said period.

There is another assignment of error in the petition of the appellants to the district court for a *supersedeas* to the decree of the circuit court, being the seventh which remains to be noticed, and is in these words: "The court erred in decreeing a balance in favor of Pierce against your petitioners under the facts of the case. Pierce refused to co-operate with them, and set up a rival establishment, which he so conducted as to yield comparatively no profits, and he is shown to have injured the common interests far more than the amount of his interest in the profits made by the company. No damage is allowed your petitioners for the injuries they have sustained. The decree allows him profits in their operation, without holding him to account for corresponding profits or damages inflicted." Damage necessarily resulted to the appellants, both in their mining and mercantile operations, from the carrying on of similar operations by the appellee, and that is the kind of damage to which the witnesses no doubt generally refer in their testimony in this cause. But as the appellee had as much right to carry on his operations as the appellants had to carry on theirs, such damage is merely *damnum absque injuria*. The appellee had no right to destroy or waste the common property, and if he had willfully done so, or by gross negligence had occasioned such destruction or

waste, he would undoubtedly have been responsible, in some form or other, for the injury thus done to his co-tenants. Some of the witnesses in this case speak of much waste having been committed in the mining operations of the appellee by the unskillful and careless conduct of his agents and hands. It does not appear that he did not employ the best agents and hands he could under the circumstances. But a sufficient answer to this complaint is, that there is no charge in the bill of any such waste or destruction. It is a bill for partition, and for the settlement of an account by the appellee, both of his mining and mercantile operations. The chief complaint of it is, that he had so conducted his operations as to make a large profit by merchandising, and a small profit by mining, and the complainants say that "after very mature reflection and much actual experience, at least a portion of them have come to the conclusion that the profits of the mercantile establishment, the necessary and indispensable accompaniment of the successful manufacture of lead, ought in equity and justice to be regarded as the joint property of the owners thereof, and that they ought to be participants in them equally, to the extent of their several interests in the subject out of which they were made." The complainants therefore pray for an account and relief accordingly.

After the bill, but before the answers were filed,—to wit, on the 9th of May, 1855,—an agreement was made between the parties whereby it was, among other things, agreed that Pierce should sell his interest in the mine, and certain lands thereto attached, for fifteen thousand dollars; and that "if said Pierce should hereafter acquire or purchase, lease, or otherwise, any interest in the property before described, he is, under no circumstances, to work his own interest, or to come into competition with the other owners in the manufacture of lead; but the business in regard to the manufacture of lead, in the event he shall acquire any further interest, is to be conducted jointly in conjunction with the other proprietors, who may be operating for the joint benefit of all interested." And it was further agreed by the parties "that as they have each been engaged in merchandising in connection with the manufacture of lead, they will, in the future settlement of their accounts, relinquish and abandon all claim, each upon the other, to mercantile profits; and in the settlement of their accounts, they will have reference only to the quantity of lead made, the expense of making, transportation, and sales, as

disconnected with the mercantile business; . . . and that this agreement is not to preclude either party from having a fair and full settlement of all the matters between them concerning the manufacture and sale of lead, with the single exception that any mercantile profits made by either party is not to be brought into the account." On the day after this agreement was entered into, a consent decree was made directing a commissioner to "take an account of the manufacture and sales of lead by the said complainants, and by the said defendant Pierce, from and after the seventeenth day of February, 1848, to be by him stated," etc. It was the duty of the commissioner under this decree to take an account only "of the manufacture and sale of lead by the" parties respectively, and not of any conjectural damages arising from any supposed destruction or waste of the property occasioned by the act or neglect of any of the parties, as that matter was not embraced in the bill, nor in the agreement aforesaid, nor in the said decree, for an account. The commissioner therefore, in taking the account, properly disregarded that matter, and all the evidence in relation thereto.

The commissioner, having taken the account, and ascertained a balance to be due thereon by the appellants to the appellee, made his report, in which this passage occurs: "The complainants will hereafter render an account of a remnant of the business still left in their hands." The circuit court overruled all the exceptions to the report, confirmed the same, and rendered a decree for the payment of the said balance, but took no notice of what was said in the report in regard to the future account to be rendered by the complainants as before stated, although the decree was final. The district court was of opinion that the circuit court should not have proceeded to a final determination of the cause, but should have confirmed the said report, and recommitted the cause to the commissioner, with instructions to state and settle the matters of account between the parties referred to in his report as not settled, but not to reopen or disturb the account so far as already settled, and make report of his proceedings to the court; and upon the coming in and confirmation of such new report, should pronounce such decree as equity may require; and the district court decreed accordingly, reversing in part, and affirming in part, the decree of the circuit court, and remanding the cause for further proceedings, but gave to Pierce his costs in the district court.

We think that, instead of reversing in part and affirming in part the decree of the circuit court as aforesaid, the district court might perhaps more properly have amended the decree of the circuit court by directing the account to be taken, which, according to the commissioner's report, the complainants were thereafter to render as aforesaid, or by reserving liberty to any of the parties thereafter to apply, by motion in the cause in the said circuit court, for an order for such an account, and then have affirmed the said decree thus amended. It is not probable that the result of that account will diminish the balance already reported to be due to the appellee, and it seems therefore to be unnecessary to withhold the payment of the said balance until that further account can be settled. The appellants do not object to the decree of the circuit court for not directing a further account. On the contrary, they say that "no exception was ever taken to the report because it was incomplete, or was not a finality; . . . neither party asked for a new order for an account, nor for a recommitment of the report; . . . the decree taken by Alexander Pierce was final, disposing of the subject and the costs,—no other or further proceeding was asked for by him"; and they therefore contend that the decree of reversal on that ground is erroneous. But as this error, if it be one, is to the prejudice of the appellee, and he does not complain, but is content with the decree of the district court as it is, we therefore think it ought to be affirmed.

Decree affirmed.

POSSESSION OF ONE TENANT IN COMMON IS PRESUMED NOT TO BE UNLAWFUL, or adverse to his co-tenant: *Berthold v. Fox*, 97 Am. Dec. 243; *Carpentier v. Mendenhall*, 87 Id. 135. Each co-tenant has an equal right of entry and possession: *Israel v. Israel*, 96 Id. 571.

LIABILITY OF CO-TENANTS TO ACCOUNT FOR RENTS AND PROFITS, and for use and occupation of common property: *Israel v. Israel*, 96 Am. Dec. 571; *Moses v. Ross*, 66 Id. 250; *Pico v. Columbat*, 73 Id. 550; *Goodenow v. Ewer*, 76 Id. 540; *Early v. Friend*, 78 Id. 665-668, note.

REPAIRS BY CO-TENANT AND ALLOWANCE FOR IMPROVEMENTS ON PARTITION: *Robinson v. McDonald*, 62 Am. Dec. 482, note; *Early v. Friend*, 78 Id. 665, note.

THE PRINCIPAL CASE IS CITED, and the principle of it applied as a mode of adjustment between the tenants in common of an iron mine, in *Newman v. Newman*, 27 Gratt. 722, 724.

RICHMOND, FREDERICKSBURG, AND POTOMAC RAILROAD COMPANY v. SNEAD AND SMITH.

[19 GRATTAN, 354.]

WHERE PRESIDENT OF RAILROAD COMPANY SIGNS IN HIS OWN NAME due-bill for "labor performed on cottage lot of railroad company," parol evidence is admissible to ascertain whether the work was performed for the president or for the company.

AUTHORITY OF PRESIDENT OF RAILROAD COMPANY TO MAKE CONTRACTS for necessary labor for the company is incident to his office, and he may furnish evidence of the amount payable under the contract, either before or after the performance of the service, and put that evidence, in his discretion, into the form of a due-bill or promissory note, unless his authority is restricted by special legislation, or by regulations of the company known to the other contracting party.

FACT THAT PRESIDENT OF RAILROAD COMPANY USUALLY GAVE NOTES of the company on printed forms, and signed them as president, will not prevent a recovery against the company upon a due-bill, not upon a printed form, and not signed as president, but is a mere circumstance to be weighed by the jury in determining whether or not the consideration passed to the company so as to make them liable.

WHEN FACTS PROVED, AND NOT EVIDENCE MERELY, ARE CERTIFIED, it may be that the appellate court should draw its own conclusions from them, uninfluenced by the opinion of jury: *Slaughter v. Tutt*, 12 Leigh, 147; but when the facts proved do not establish the ultimate facts, but they are to be deduced by balancing the different facts proved, and by weighing and comparing the inferences to be drawn from them, respect should be paid to the verdict and judgment in the court below.

ASSUMPSIT. Verdict was rendered for the plaintiffs; and the defendants' motion for a new trial, on the ground that the verdict was contrary to the evidence, being overruled, they appealed. The opinion states the case.

Steger and Sands, for the appellants.

Lyons and August, for the appellees.

By Court, JOYNES, J. This is an action of *assumpsit* by Snead and Smith against the Richmond, Fredericksburg, and Potomac Railroad Company, to recover for certain work and labor performed by the slaves of the plaintiffs. The declaration contains only the common counts. And the principal question is, whether the money claimed by the plaintiffs is due from the railroad company or from Edwin Robinson, who was president of the company at the time the work was done. The jury found a verdict for the plaintiffs; and the court overruled a motion of the defendants for a new trial. The bill of exceptions certifies the facts found on the trial. Such was the obvious intention of the certificate, and I perceive no in-

consistency between any of the "facts" certified. It is not enough, however, that a bill should purport, by its terms, to certify "the facts proved," if such is really not the substance of what is certified: *Vaiden v. Commonwealth*, 12 Gratt. 717.

The plaintiffs gave in evidence the following paper, the body and signature of which were proved to be in the handwriting of Robinson, the president of the company, and which was given by him to one of the plaintiffs upon a settlement for the work, which is the ground of the present claim:—

"\$484.

RICHMOND, May 31, 1856.

"Due Joseph H. Snead and Benjamin E. Smith four hundred and eighty-four dollars, in full, of labor performed on cottage lot of the railroad company, the same payable on demand, with interest from date.

ED. ROBINSON."

It does not distinctly appear, from the terms of this paper, whether it was designed to acknowledge a debt due by Robinson, who signed the paper in his own name, or by the company, whose officer and agent he was, and upon whose lot the work is stated to have been done. The language is ambiguous and consistent with either view, and parol evidence of the consideration, and of the origin of the paper, is admitted to explain its meaning in this respect: *Early v. Wilkinson*, 9 Gratt. 68; 1 Am. Lead. Cas., 3d ed., 606, notes to *Rathbone v. Budling*; *Nash v. Towne*, 5 Wall. 689. That would be so, even if the action were founded on the paper itself. It is so *a fortiori* where the action as in this case is founded on the original consideration.

It was proved on the part of the plaintiffs, among other things, that they removed to Ashland, where the cottage lot is located, in the fall of 1854; that Robinson, who was the president of the railroad company, applied to the plaintiff Snead to hire the hands of the plaintiffs, and agreed to give him \$1.25 a day for each of them; that during the months of November and December, 1854, the hands worked under the direction of one Thompson, who was a section master upon the railroad of the defendants; that in January, 1855, the hands of the plaintiff were turned over to the control and management of the plaintiff Smith, who made all the contracts for work done by them, and kept the accounts; that they were seen at work under the direction of Thompson, the section master, sometimes upon the railroad of the defendants and sometimes upon the cottage lot, the property of defendants; that some of the first work done by the hands of the plaintiffs was paid for by the defendants; and that between 1852 and 1856 one Taylor

was employed by said Robinson to do work upon the cottage lot of the defendants, for which work he was paid by defendants. It was further proved by the plaintiffs that in the spring of 1856, the plaintiff Smith being about to remove from Ashland to the county of Lunenburg, the plaintiff Snead advised him to go down to Richmond and settle the accounts with the defendants; that Smith went down accordingly, and when he returned told Snead that he had taken a note with interest, but that in consequence of the action of Thompson he had been compelled to lose about one hundred dollars.

These are all the material facts proved by the plaintiffs, except one or two, to be mentioned hereafter.

The defendants gave in evidence certain proceedings of the board of directors of the railroad company, and other documents connected therewith, from which the following facts appear:—

In the year 1836, the railroad company purchased, for the purpose of procuring timber and wood for the use of the railroad, a tract of over four hundred acres of land, on which Ashland is now situated. A cottage was subsequently built upon this land, but the date of its erection does not appear, though it seems to have been erected prior to November, 1852. In November, 1852, the board of directors passed a resolution authorizing the president to convey a title upon payment of the purchase-money, to such persons as had purchased or might purchase any portion of the lands of the company in the neighborhood of the cottage. This building was erected at the expense of the railroad company. In July, 1857, the board passed a resolution reciting that the president had, under the authority conferred by the resolution of November, 1852, disposed of forty-three acres and a fraction of the land, comprising lots Nos. 22, 23, and 24, to himself and others associated with him in the improvement known as the hotel property, and that upon said lot No. 24 a building known as the cottage building had been located at the expense of the company, the cost of which, with such other improvements as had been made in like manner, was to be refunded by the said purchasers, and directing a conveyance of the said property to Edwin Robinson and his associates, upon payment of the cost of such improvements and interest, to be ascertained by the treasurer and superintendent. In September, 1857, a resolution was adopted appointing one arbitrator to act with another to be selected by the Ashland Hotel Company, for the

purpose of ascertaining the expenses which had been incurred by the company in the erection of the cottage and other buildings, and in the improvement of the adjoining grounds. In April, 1858, the arbitrators made their report, in which they stated that the railroad company furnished all the materials and executed all the work for the cottage building, except the painting, plastering, a portion of the window blinds, and the gas-fixtures; that in respect to the graveled walk and the decorations of the lawn. the gravel, and most of the labor of spreading it, were furnished by the railroad company, and that the cutting down of the trees and wood on the lawn, and the grubbing and shrubbing of the lawn, were done by the railroad company, and that the balance of the work, such as as grubbing, plowing, and grass-seeding, were done by the hotel company. They assessed the cost of the improvements as follows:—

The cottage, as far as completed by the railroad company.....	\$2,150
Bathing-house and kitchen.. ..	350
Graveled walk and work on lawn.	100
	<hr/>
	\$2,600

At the same time the board passed a resolution confirming the report of the appraisers, and reciting that it had been agreed between the railroad company and the Ashland Hotel and Mineral Well Company, that the latter company should pay the amount assessed by the said report, and that the property upon which the said cottage and other improvements were located should thereupon be conveyed to said hotel company, and that a deed had been executed and tendered in accordance with said agreement, and directing the treasurer of the railroad company, before the delivery of the said deed, to require of the hotel company their obligation, payable on demand for \$4,407.50, with interest, with Edwin Robinson as security, who should execute his individual bond for the same sum, and payable in like manner, and deposit with the treasurer one hundred shares of the stock of said company, with a power of sale as a further security.

It was further proved by the defendants that for several years prior to 1856 Edwin Robinson claimed the hotel and cottage lots as his own, and had expended large sums in the improvement of them; that he built a hotel upon the hotel lot, which he kept by an agent; that the improvements put upon the property by

Robinson were very extensive, the cost of them in 1856, at which time they had all been completed, being some fifty thousand or sixty thousand dollars; that he had built and paid for two cottages on the cottage lot, and had also paid for certain additions to the ball-room, which was on the said lot, and for certain repairs to the fencing and other job-work on the said lot, all before 1856; that the cottage lot was used by Robinson in conjunction with the hotel lot, the ball-room, billiard-saloon, and bowling-alley being on the cottage lot; that Edwin Robinson was the principal, if not the only, stockholder in the Ashland Hotel and Mineral Well Company; that after the appraisement aforesaid, the property above mentioned was conveyed to said company; that Robinson, about 1855 and 1856, was hard run for money, but that his credit was good, and he could always borrow large sums.

It was proved, on the part of the plaintiffs, in addition to the facts already mentioned, that prior to the fall of 1860 Edwin Robinson had failed, and left the state of Virginia; that he was a man of integrity, and that the plaintiff Snead had from time to time lent him money, for some of which he still held his bonds; that payment of the debt claimed in this action was not claimed of the defendants before the fall of 1860 (when the action was commenced), because the plaintiffs were not in want of money, and the debt bore interest, and was considered a good investment.

It was further proved by the treasurer of the defendants that while Robinson was president he did sometimes execute notes for the defendants; that these notes were in printed forms, in which the company promised to pay, and were signed by Robinson as president; that the usual mode of certifying work done for the company was for the superintendent to certify what was done, and its value, and to accompany the certificate with an order on the treasurer to pay it, which was the course required by the regulations of the company; and that the witness had never known the president to give such certificate for work done for the company.

The defendants further proved that about twelve years before the trial (which was in March, 1868), a witness who met the plaintiff Snead at Ashland heard him say that he was very busy doing some work for Mr. Robinson on the cottage lot.

These are all the material facts of the case.

The original contract of hiring was made with the plaintiff Snead, by Robinson, who was then the president of the rail-

road company. Both he and the company were then probably engaged in doing work upon the cottage lot, though it does not appear when Robinson commenced his improvements upon that particular lot. The terms of the contract, except as to the price, do not appear; as far as appears, nothing was said about the particular work for which the negroes were hired, or as to the party who was to pay the hire. The contract was made some time in the fall of 1854, and the slaves worked in the months of November and December of that year. What particular work they did in those months does not appear; but it does appear that the work, whatever it was, was done under the direction of Thompson, who was a section master of the defendants. The necessary inference is, that it was work done for the defendants; for it cannot be presumed that the agent of the defendants would have the direction of the hands engaged in working for any party other than the defendants.

Whether there was a new contract after January 1, 1855, when the control of the slaves and the making of the contracts for their labor were turned over to the plaintiff Smith, does not appear. But the slaves still worked as before, under the direction of Thompson, who was still a section master of the defendants. They so worked, sometimes on the railroad of the defendants, and sometimes on the cottage lot. And it does not appear that these slaves worked at any time upon the cottage lot, except under the direction of said Thompson. The inference must be, for the reason already assigned, that all the work done by them on the said lot was done for the defendants, and that they were in their service. They were, therefore, employed sometimes upon the cottage lot, and sometimes upon the railroad, as occasion required, but always under the direction of Thompson.

And accordingly the plaintiffs understood that their contract was with the railroad company. Snead advised Smith to go to Richmond to settle his accounts with the company. Smith went to Richmond and had the settlement, and when he came back told Snead that he had taken a note with interest, but that in consequence of the action of Thompson he had been compelled to lose about one hundred dollars. Robinson was then in good credit.

Why should Snead then treat the claim to be settled as one against the company, if it was really against Robinson? And what had Thompson to do with the claim, except as the agent

of the defendants, under whose direction the slaves had worked in their service? It further appears that the payment of the note was not sooner demanded of the defendants only because it bore interest, and was regarded as a good investment.

But that is not all, for it appears that some of the first work done by the plaintiffs' slaves was paid by the defendants. This was an admission that the slaves were in their service, and in the absence of notice to the company, gave the plaintiffs a right to look to the defendants for the payment of the subsequent hires, at least to the extent of all the work done upon their property.

It is true that Robinson was, at the same time, doing work at his own expense upon the cottage lot; but it does not appear that the slaves of the plaintiffs did any work on that lot or elsewhere, under his direction, or under the direction of any agent or servant of his. The improvements put upon the cottage lot by him may have been more extensive and costly than those put upon it by the defendants, but it appears that those of the defendants amounted to two thousand six hundred dollars, at least. And while Robinson claimed the lot under an executory agreement with himself as president of the company, with the terms of which he had not yet complied, and which had not yet been assented to by the board of directors, the title was confessedly in the defendants, and so remained until after April 13, 1858.

It is insisted, however, that the appraisalment of the arbitrators shows that of the two thousand six hundred dollars assessed by them as expended by the railroad company upon the improvement of the cottage lot, only one hundred dollars was for such labor as would probably be performed by slaves. But this proves nothing against the plaintiffs. They were not privy to that appraisalment, and are not bound by it. The slaves may have performed labor in connection with the cottage, bathing-house, and kitchen, and which was, therefore, embraced in the first two items of \$2,150 and \$350, or it may have been the intention of Robinson to charge himself with the payment of the note held by the plaintiffs, although the work was done for and on the credit of the company, and he may, therefore, have given no account of it to the arbitrators. But however all this may have been, and whatever Robinson may have done or intended without the knowledge and assent of the plaintiffs, the work, as we have seen, was done upon a lot belonging to the defendants; it was done under the direc-

tion of an agent and servant of the defendants, while they were engaged in making improvements on the said lot; the plaintiffs understood and believed that their contract was with the defendants, and therefore gave credit to them alone; and they were justified in thus giving credit to the defendants by the fact that the defendants had paid them for part of the labor of the same slaves, and had not notified them that they would be liable no longer, even for work done on their property.

The authority of Robinson, as president of the railroad company, to make contracts for the necessary labor for the company, was incident to his office, and has not been disputed. So he might furnish evidence of the amount payable under the contract, either before or after the performance of the service, and put that evidence, in his discretion, into the form of a due-bill or promissory note. Such incidental powers exist by law and general usage, and exist in all cases where the authority of the president is not restricted by special legislation, or by regulations of the company known to the other contracting party. And it is obvious from the testimony of the treasurer that there was then no regulation of the company restricting the power of Robinson to execute promissory notes for the company.

The argument, however, is, that as Robinson usually gave notes of the company on printed forms, and signed them as president, it is to be presumed that the paper given to the plaintiffs, which is not on a printed form, and not signed as president, was not intended to bind the company. It is not proved that he never gave an acknowledgment of debt, or made any other paper binding the company, except on a printed form, and with the addition of president to his signature. But if that had been proved, it would only have been a circumstance to be weighed by the jury in determining the question in this case, namely, whether the work for the price of which the action is brought was done for the defendants, and so as to make them liable to pay for it.

Upon the whole, I am of opinion that the verdict of the jury is fully sustained by the facts proved.

It is not necessary, therefore, to say anything in reference to the case of *Slaughter v. Tutt*, 12 Leigh, 147, which was cited in the argument by the counsel for the railroad company, to show that as the facts proved, and not the evidence merely, has been certified, we ought to draw our own conclusions from

them, uninfluenced by the opinion of the jury or of the circuit court. That case, however, admits that when the facts proved do not establish the fact necessary to a just conclusion, but such further fact is to be inferred from the facts proved, and the facts proved leave it uncertain whether such further fact can or cannot be fairly inferred, respect ought to be paid by the appellate court to the verdict and judgment in the court below; and I apprehend that respect should thus be paid to the verdict and judgment below, in every case where the ultimate facts, upon which the legal conclusion in the case must rest, are to be deduced by balancing the different facts proved, and by weighing and comparing the inferences to be drawn from them. In such a case, this court should not reverse the judgment upon the verdict, unless it be a case of "plain deviation."

I am of opinion, therefore, to affirm the judgment.

RIVES, J., concurred in the opinion of JOYNES, J.

Judgment affirmed.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW WHETHER OR NOT CORPORATION IS BOUND by an instrument executed by an officer in his individual name: *Musser v. Johnson*, 97 Am. Dec. 316, and note 319. See *Cuphart v. Dodd*, 96 Id. 258, and note 259; *Yowell v. Dodd*, 96 Id. 256, and note 257. In *Hypes v. Griffin*, 89 Ill. 137, it is held that parol evidence cannot be admitted to exonerate an agent or trustees of a religious society who have entered into a written contract in which he or they appear as principal or principals, even though it be shown that the payee had notice of the agency at the time the contract was executed; but it is also said, citing the principal case, that, although the agent may contract in his own name, still, in a suit against the alleged principal, it is competent to show by parol the real facts, and that the contract was made on behalf of the principal, who also may be charged; and in such case the promisee may bring his action against either party.

CORPORATION MAY BE BOUND IN MATTERS OF SIMPLE CONTRACT by duly authorized agent acting within the scope of his authority: *Musser v. Johnson*, 97 Am. Dec. 316, and note 319; *Mitchell v. Deeds*, 95 Id. 621; *Rachne etc. R. R. Co. v. Farmers' L. & I. Co.*, 95 Id. 595, and notes.

VERDICT WILL NOT BE SET ASIDE on the ground that it is against the weight of evidence: *Ophir Silver Mining Co. v. Carpenter*, 97 Am. Dec. 550, and note 550. But see *New Orleans etc. Co. v. Statham*, 97 Id. 478, and note 499.

BILLGERRY v. BRANCH AND SONS.

[19 GRATTAN, 302.]

WAR OPERATES AS INTERDICTION OF ALL COMMERCIAL AND OTHER PACIFIC INTERCOURSE and communication with the public enemy; and every species of private contract made with subjects of the enemy during war is unlawful.

CHECK OR BILL OF EXCHANGE DRAWN BY CITIZEN OF ONE BELLIGERENT upon a citizen of the other during war is unlawful and void.

LATE REBELLION WAS WAR, AND CITIZENS ON OPPOSITE SIDES WERE ALIEN ENEMIES, and their relations, under the constitution, were suspended and superseded for the time by new relations under the laws of war.

INTERNATIONAL LAW APPLIED TO CONTRACTS AND TRANSACTIONS BETWEEN RESIDENTS within the limits of the Confederacy and residents in territory under federal authority.

CHECK DRAWN AND INDORSED IN VIRGINIA DURING LATE CIVIL WAR upon a bank in New Orleans, while New Orleans was under the permanent possession and control of the federal forces, is void, and the contract of indorsement is void, though all the parties, except the New Orleans bank, were residents and citizens of the Confederate States.

DEMAND OF PAYMENT OF CHECK MADE BY RESIDENT OF VICKSBURG upon bank in New Orleans while commercial intercourse between Vicksburg and New Orleans was prohibited by proclamation of the President, was illegal.

NOTICE OF DISHONOR OF CHECK DEPOSITED IN POST-OFFICE AT NEW ORLEANS while that city was under permanent federal occupancy and control, and addressed to Petersburg, Virginia, during the pendency of the civil war, was of no avail, unless it were shown that the law or a general usage required the letter containing the notice to be preserved by the postmaster until the restoration of mail communication, and then forwarded to its destination.

ASSUMPSIT by Billgerry against Branch and Sons upon three checks drawn August 26, 1862, by the Farmers' Bank of Virginia, at Richmond, upon the New Orleans Canal and Banking Company, at New Orleans, and indorsed by the defendants to the plaintiff February 20, 1863. The defendants were residents of Petersburg, Virginia, and the plaintiff resided at Vicksburg, Mississippi. On the 23d of October, 1863, the checks were presented by the plaintiff at the New Orleans bank for payment, which was refused; and they were then regularly protested, and notice of the protest was deposited in the post-office at New Orleans, addressed to the defendants at Petersburg, Virginia; but at that time there was no mail communication between these cities. Judgment for the defendants, and the plaintiff appeals. In other respects the opinion states the case.

Wise and Fitzhugh, for the appellant.

Crump and Jones, for the appellees.

By Court, RIVES, J. It does not seem material to consider or settle the question of pleading raised by the demurrers to the original and amended declarations in this case. The common counts in *indebitatus assumpsit*, which were sustained, would have sufficed to sustain a recovery under the authority of *Bank of United States v. Jackson*, 9 Leigh, 221. The contract was one of privity between these parties, and sprung out of the payment of money by one to the other. Had the case been submitted to a jury, it would have conduced to a clearer development of the issue, if the plaintiff had been allowed to count specially, as he did in his amended declaration, upon the particular facts of his demand. The practice of relying on these general counts was disapproved and discouraged at an early date in the case of *Wood v. Luttrell*, 1 Call, 232, 240, by Judge Pendleton, who used this just and emphatic language: "I cannot forbear to mention that I do not like this new practice of general counts much, as they tend to surprise the other party, without giving him the opportunity of preparing for a full defense." But in this case, the parties waived their right to have a jury for the trial of this cause, and agreed that the whole matter, of law and fact, should be heard and determined by the court. Inasmuch, therefore, as the court held and was well justified in holding, that a recovery, if at all, might be had under the common counts, and proceeded to hear and determine the case upon its merits under these counts, we are relieved of the necessity of adjusting the pleadings with any technical nicety. There was, perhaps, no other reason for sustaining the demurrer to the amended declaration, save that it did not, in the opinion of the court, set out a legal cause of action,—a conclusion also reached in the judgment given for the defendants upon the facts.

We are therefore remitted to the inquiry whether the contract in this case was capable of being asserted in a court of law. The parties to this contract were all alike residents of the Confederate States. In February, 1863, the plaintiff in error purchased of the defendants three several drafts of the Farmers' Bank of Virginia upon the New Orleans Canal and Banking Company, bearing date the 26th of August, 1862, for the sum of two thousand dollars each. Prior to the date of these drafts, the city of New Orleans had been taken by the

forces of the United States, and so "occupied and controlled" by them as to be excepted out of the terms of the President's proclamation of the 16th of August, 1861, that had declared Louisiana, along with other southern states, in a state of insurrection against the United States. The taking of the city was followed by the President's proclamation of the 12th of May, 1862, raising the blockade of its port from and after the first day of June, 1862; and the decisions of the supreme court have fixed the 6th of May, 1862, as the period of the full and final restoration of the city to the jurisdiction and authority of the United States. These facts disclose a case of a contract of indorsement between citizens within the insurrectionary districts, during the pendency of hostilities, of a bill drawn by a bank in Virginia upon a bank in New Orleans, that was then claimed and recognized as within the rightful territory of the United States. This statement is sufficient to reveal, in its true light and bearing, the important question upon which we have to pass in this case. In another part of this investigation I may have to recapitulate other circumstances relevant to other topics of this discussion; but for present purposes, I have stated all that is necessary to possess us of the points made in this case.

Now it is alleged that the purchase of this bill was illegal and void on two grounds: 1. That it was a trading, condemned and avoided by the laws of nations in case of international wars, which, for the purposes of this argument, are assumed to rest upon the same principle and reason as our late internal war; and 2. That it was prohibited and annulled by the act of Congress of July 13, 1861, interdicting "all commercial intercourse" between the inhabitants of the insurrectionary districts and the citizens of the rest of the United States. These positions are plainly contradictory; the one referring the claim to the decision of international law, and the other to the decision of municipal law. They cannot both stand together; a choice must be made between them. If the case rests on international law, the municipal is excluded; and *converso*, if within the pale of the municipal, it is without that of the international.

Hence our first inquiry should be, whether the contract relied on in this case is affected by, or within, the purview of the law of nations touching dealings between alien enemies; and herein we have to consider at the outset the assumption already alluded to, namely, that our late civil strife was

attended with all the legal incidents and consequences of a war *inter gentes*. In calling this an assumption, I do not mean to treat with any disrespect the argument of the counsel for the appellees; but I rather indicate thereby the strong and decided sense I entertain of what I humbly submit it can be satisfactorily shown to be. I understand the position to be, that there is no distinction, upon reason or authority, between public war, of whatever sort, and international war, in the vacating of contracts between individual citizens of belligerent countries *flagrante bello*. That we may more critically examine and determine the soundness of this position, let us first acquire a precise and definite idea of this important tenet of the law of nations. Its indispensable attribute is, that it should be a contract between "alien enemies," because the doctrine is founded on the principle that a declaration of war puts not only the adverse governments in their political capacity at war, but renders all the subjects of the one the enemies of the subjects of the other: Vattel, b. 3, c. 5, sec. 70; also note to *Clemontson v. Blessig*, 11 Ex. 135. Hence, "no valid contract can be made, nor any promise arise, by implication of law from any transaction with an enemy," says Justice Clifford, in *Hanger v. Abbott*, 6 Wall. 534.

These conditions are all fulfilled in the case of foreign wars between independent nations, because it can be aptly said of them that a state of war is contradictory of a state of commerce, and that there cannot be war for arms and peace for commerce. Considerations of public safety, imperiously forbid all contracts between alien enemies; so that after the termination of the war, during which they were made, the illegality of the transaction may be set up as a valid defense against an action founded upon any such contract. But are such conditions found in a war waged between citizens of a common country? and is this doctrine at all applicable to the *status* or the dealings of fellow-citizens embroiled in a civil war? Under our complex system of state and federal governments, the constitution of the United States is not overthrown by the insurrection of any portion of the people, however formidably arrayed or efficiently organized under all the facilities of revolt arising out of their separate organizations into states, under all the forms and with all the powers necessary to command the resources and services of their inhabitants. Whatever may have been the theory on which this rebellion was projected and justified, it has confessedly yielded

to the grand arbitrament of arms; and we need not now be disquieted or harassed by any doubt that the constitution of the United States reigned supreme over all the states and all the citizens during the whole of this deplorable conflict and since, with such exceptions only as are due to the clash of arms, and the necessities of state. We shall in vain look through the whole range of decisions of the supreme court for the slightest intimation that this rebellion had affected the supremacy of the constitution, or released the revolted states or their citizens from its authority, or their allegiance to it. It is true that the war was of such dimensions, and was so organized, under the auspices of the revolted states, into a new and separate Confederacy, that the government of the United States was compelled to waive some of its strict and theoretical rights over the insurgents. It would have been idle to send out with its armies, as was done in the case of the whisky insurrection in Pennsylvania, civil officers, to whom captured insurgents might be turned over for arrest, trial, conviction, and punishment. It was the dictate of necessity and policy to recognize the Confederate States as a government *de facto*; to concede belligerent rights to them; to acknowledge a state of internal war; to treat captives, both on land and sea, as prisoners of war, and provide for their exchange; to declare a blockade of the ports in the insurrectionary districts; and assert under the law of nations the rights of capture and prize *jure belli*. These concessions were properly made to mitigate the rigors of this fratricidal war, and conduct more effectively and humanely to the suppression of the revolt. They were conceived in the spirit of the exalted teachings of the most enlightened and accredited publicists. Vattel, book 3, chapter 18, section 294, recommends that "the common laws of war — those maxims of humanity, moderation, and honor which we have already detailed in the course of this work — ought to be observed by both parties in every civil war. For the same reasons which render the observance of those maxims a matter of obligation between state and state, it becomes equally and even more necessary in the unhappy circumstance of two incensed parties lacerating their common country. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals; if he does not religiously observe the capitulations, and all other conventions made with his enemies. they will no longer rely on his word; should he burn

and ravage, they will follow his example; the war will become cruel, horrible, and every day more destructive to the nation." While therefore, in the pursuance of these wise and humane maxims, the government of the United States departed from the theory *strictissimi juris* in its constitutional suppression of this insurrection, there was never in any authoritative quarter an admission that the insurgents, by reason of being acknowledged as *quasi* enemies to the extent of these concessions, were not amenable to the constitution and the laws. This did not in fact involve any contrariety in the *status* thus ascribed to them; and when such was alleged in the *Prize Cases*, 2 Black, 635, 670, Justice Grier, with no little warmth, denounced it as "the anomalous doctrine, which this court are now, for the first time, desired to pronounce, to wit, that insurgents who have arisen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies, because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war, because it is an insurrection."

But if by the intendment of law the constitution of the United States pervaded the whole land, notwithstanding the insurrection, and was in theory the supreme law to insurgents as well as loyal citizens, the municipal law went along with it, and governed contracts. To term the citizens of the Confederate States enemies is far from being tantamount to calling them "alien enemies." We are told, *Prize Cases*, 2 Black, 674, that "the word 'enemy' is a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law; and besides, that citizens of the Confederacy, while traitors for having cast off their allegiance and made war on their government, are none the less 'enemies.'" All this is conclusive to show that the courts have never for one moment lost sight of or relinquished the principle of the nullity of the attempted withdrawal of the southern states, and the supremacy of the constitution and the laws in spite of it. Upon what principle and reason, then, shall we be required in this case to take rebellious subjects out of the pale of a constitution which they have failed to overthrow, and submit their dealings and contracts to international rather than municipal law? It would seem to be enough to reply that the correct theory of our disastrous conflict does not admit of the idea that the parties to it were

foreign and independent nations, and the citizens of the one "alien enemies" respectively of those of the other.

Upon principles of reason therefore, distinguishing the case of our late war from that of a war *inter gentes*, I conclude that this case does not come under the interdict of international law against contracts between "alien enemies." But we are told that we are not left to the conclusions of reason upon this subject, but are shut up to the decisions of the supreme court of the United States that are alleged to apply this doctrine for the vacation of contracts between opposing belligerents pending the war to our late war, as fully as if it had been an international war. This assertion cannot rest upon anything more than analogy; but even thus qualified, it excites my unfeigned surprise. I shall therefore take up all these cases in their order that have been referred to, and ascertain whether they are susceptible of being used as authority for a position, which I have endeavored to show is contrary to reason.

The first reference is to the *Prize Cases*, 2 Black, 635. The chief controversy in those cases was as to the right of the President, in the absence of any act of Congress declaring or recognizing a state of war, to proclaim a blockade of the ports in possession of the states in rebellion. There was a difference of opinion among the judges on this point, but all conceded the right to exist after the act of the 13th of July, 1861, authorizing the President to interdict all trade and intercourse between the inhabitants of the states in insurrection and the rest of the United States. The court, however, was of opinion that the right to institute this blockade pertained to the President *jure belli*, and therefore upheld the authority and legality of his proclamation of blockade of the 19th of April, 1861, although prior to any congressional recognition of the war.

Another proposition was also laid down in these cases, namely, that property of persons within the Confederacy was to be deemed enemy's property without reference to the individual *status* of the owner, and therefore lawful prize. These were cases affecting the rights of the United States as sovereign, and of captors claiming under its laws, where, as I have already shown, the government had chosen to follow the law of nations rather than exercise its municipal right to close its ports. Thus in the case of *The Circassian*, 2 Wall. 135, the chief justice observed that "the government of the United States, involved in civil war, claimed the right to close, against

all commerce, its own ports seized by the rebels, as a just and proper exercise of power for the suppression of attempted revolution. It insisted, and yet insists, that no one could justly complain if that power should be decisively and peremptorily exerted. In deference, however, to the views of the principal commercial nations, this right was waived, and a commercial blockade established." This declaration of one who was a member of President Lincoln's cabinet is an authoritative disclosure of the motive for exchanging the municipal right for the belligerent right under the law of nations. But this falls far short of the pretension that has been founded on these cases. It in fact receives no countenance from them. But resort is had to certain incidental remarks of Justice Nelson, who gave the dissenting opinion in these cases. He is depicting the consequences of war, and enumerates among them the invalidity of contracts *flagrante bello*. The statement of the doctrine was perfectly true in the connection in which he made it; but the doctrine was in no wise involved in the adjudication of those cases, and cannot now be wrested from the context, and made to apply to the quite different question we are now making, without an inexcusable perversion of his *obiter dicta*. And yet this is all the analogy between those cases and the one at bar.

Next comes the case of *Alexander's Cotton*, 2 Wall. 404. This cotton was captured on land by a naval force of the United States in the spring of 1864, and was libeled as prize of war; but it was held not to be "maritime prize," and to be embraced by the act of Congress of March 12, 1863 (12 Stats. at Large, 591), providing for the collection of abandoned property, etc., whereby such property captured during the rebellion should be turned over to the treasury department to be sold, and the proceeds deposited in the national treasury, so that any person asserting ownership of it might prefer his claim in the court of claims under the said act, and, on making proof to the satisfaction of that tribunal that he had never given aid or comfort to the rebellion, have a return of the net proceeds decreed to him. In this case, as in *Prize Cases*, 2 Black, 635, the proposition was again reiterated that "the court could not look into the personal character and dispositions of individual inhabitants of enemy territory." "We must be governed," says the chief justice, "by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of

each state or district in insurrection against the United States must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed." But this language, broad and comprehensive as it is, must be confined, for purposes of interpretation, to the case in hand; and that was one between the rights of the government on the one hand, and those of a citizen on the other hand. It did not relate to controversies between individuals on the opposite sides, or tend to admit or tolerate the plea of "alien enemy" in suits between such parties after the cessation of the war. Nothing breeds more confusion of ideas than to seize on a particular expression, tear it from its context, and then insist on the universality of its meaning, and its application to cases not in the mind of the writer, because of its capacity literally to embrace them. Without proper discriminations, we must continually fall into serious errors in weighing and interpreting judicial decisions; and it is through the lack of such precaution, as it seems to me, the notion prevails that this, and the *Prize Cases*, *supra*, attribute to civil wars as well as to international wars this faculty of annulling contracts between belligerent individuals.

The *Ouachita Cotton Case*, 6 Wall. 521, to which we were next referred, does not relate to the question we are now considering. It was wholly under the municipal law, and involved the construction of the act of Congress of July 13, 1861, and the subsequent proclamation of President Lincoln in pursuance of it, under which it was held that purchases of cotton from the rebel Confederacy by citizens or corporations of New Orleans, and libeled during the war, were void. These measures were regarded as "restoring New Orleans after its occupation by the military forces on the 6th of May, 1862, so completely to the national authority as to clothe its citizens with the same rights of property, and subject them to the same inhibitions and disabilities as to commercial intercourse with the territory declared to be in insurrection as the inhabitants of the loyal states." This, I presume, might also have been the case had these belligerents been foreign and independent nations in this predicament towards each other, under the authority of *The Hoop and the Bella Guidita*, 1 C. Rob. 196, 207, and *United States v. Rice*, 4 Wheat. 246; so that Justice Swayne, apart from the act of Congress and the proclamation of the President, justly regarded it as "the result of well-settled principles of public law."

The last case that has been cited for the appellees on this point is *Hanger v. Abbott*, 6 Wall. 534. It was there decided that the war had the effect of suspending the statute of limitations in the states, so that the time during which the courts in the lately rebellious states were closed to citizens of the loyal states is, in suits brought by them since, to be excluded from the computation of the time prescribed by such statute, though exception for such cause be not provided for in the statute. This doctrine is deduced from and justified by the principle that while war does not annul an antecedent debt, it suspends the remedy therefor, so that the right and the remedy are both revived by peace; but this would be nugatory should the war last for the period of limitation, and there be nothing to stop the running of the statute. To give efficacy, therefore, to the principle that the return of peace brings with it both "the right and the remedy," it is necessary that the statute should be suspended for the war; or else, as it is here said: "The citizens of a state may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete." This is, in truth, a precedent for removing obstacles from the path of the creditor after the war; and I do not see how it can be tortured into an authority for annulling all war debts and contracts sued on after peace. It is true in this case, as in the *Prize Cases*, *supra*, much is said upon the general consequences of war in the prohibition of all trading, negotiation, communication, and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government; but it has only a remote and incidental bearing upon the point in issue, is, in truth, a mere preface to the discussion of it, and in no respect enters into the body of the judgment. While, therefore, I do not dissent from these declarations, but on the contrary accept them as a part of the law of nations, I do humbly protest against the effort to make them authority in reference to a civil war, or any other public war, except a war *inter gentes*.

I have thus carefully canvassed and sifted these authorities, and have not been able to find anything in them that assimilates civil to international war in its avoiding trading and contracts during its pendency. Had such an incident belonged to civil war, why is it that no instance of it can be found, after the most diligent search in the records of judicial

proceedings, during such wars? and where was the necessity of the act of Congress, if, in our intestine warfare, the public law of nations applied to it and effected the same end?

But all this is mere negation. Positive and direct authority exists against this pretension of the appellees, and that in a decision of the supreme court. In it, I have found the very basis and staple of the arguments I have been advancing. I allude to the case of *Mauran v. Insurance Co.*, 6 Wall. 1. It arose upon a policy of insurance upon a ship afterwards captured by a confederate vessel, which policy had a marginal warranty "free from loss or expense by capture." To determine whether this loss arose from "assailing thieves" or "pirates," for which the insurer was bound to pay, or from a capture, the risks of which the assured took upon himself by his warranty, made it necessary for the court to ascertain and define the character of the Confederate States government. It accordingly did so, and declared it to be a government *de facto*. Justice Nelson, whose language in the *Prize Cases*, *supra*, was quoted by the counsel for the appellees, delivered the opinion of the court in this case, and laid down their theory of our late struggle in the following striking passages: "We agree that all the proceedings of these eleven states, either severally or in conjunction, by means of which the existing governments were overthrown and new governments erected in their stead, were wholly illegal and void; and that they remained, after the attempted separation and change of government, in judgment of law, as completely under all their constitutional obligations as before. The constitution of the United States, which is the fundamental law of each and all of them, not only afforded no countenance or authority for those proceedings, but they were, in every part of them, in express disregard and violation of it. Still, it cannot be denied but that, by the use of these unlawful and unconstitutional means, a government in fact was erected greater in territory than many of the old governments in Europe, complete in the organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources in men and money to carry on a civil war of unexampled dimensions, and during all which time the exercise of many belligerent rights were either conceded to it, or were acquiesced in by the supreme government, — such as the treatment of captives, both on land and sea, as prisoners of war; the exchange of prisoners; their vessels recognized as prizes of war, and

dealt with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutrals, the same as in open and public war. We do not inquire whether these were rights conceded to the enemy by the laws of war among civilized nations, or were dictated by humanity to mitigate the vindictive passions growing out of a civil conflict." Again, in *White v. Cannon*, 6 Wall. 443, it is said that "the objection that the judgment of the supreme court of Louisiana is to be treated as void, because rendered some days after the passage of the ordinance of secession of that state, is not tenable. That ordinance was an absolute nullity, and of itself alone neither affected the jurisdiction of that court, or its relation to the appellate power of this court." If, then, we accept these opinions of the supreme court as the law of the land, I do not see how the contracts of the citizens of a common country, though harassed by civil war, are to fall under the ban of international law as to contracts between alien enemies in time of war. To impute the doctrines of "alien enemy" to the relations of a people under the same constitution of government in the eye of the law, though engaged in an insurrectionary war, would be in flagrant opposition to these decisions, which we are bound to respect and follow.

That the understanding of the country also conforms to the state of the law, as thus expounded, we have striking proof and an impressive example in the general acquiescence in the nullity of the sequestration or confiscation laws of the Confederate States. A greater hardship and loss cannot well be conceived; and yet I have not heard of the first case in this state of an attempt to resist at law the repayment of a debt, or the restoration of property, which had been sequestered or confiscated under this law of the Confederate States. And yet if this pretension of applying international law to the case be correct, this law stands justified by the strict rights of war; and is really valid, though not approved by the practice and rules of later times. But it seems the question was made before the circuit court of the United States at Raleigh, in which the chief justice reviewed the very points that have been made in the argument here, and fully sustained the views I have taken. The pamphlet containing his opinion—*Shortridge v. Macon*, 1 Abb. C. C. 58—is before us. He was met there, as we are here, by the assertion that the decisions

of the supreme court, already cited, declared the principle that all the doctrines of international law as to war *inter gentes* were applicable to the powers and rights of the two governments, and the dealings of the respective citizens of each with those of the other; so that a state of civil war, like a state of international war, would validate acts of confiscation, and also stop interest on debts thus deemed to be foreign. But he distinctly disclaimed and repelled this interpretation of these cases, and gave judgment for the debt, interest as well as principal.

After a succinct recapitulation of the points settled by the supreme court, he adds with emphasis: "But there is nothing in that opinion which gives countenance to the doctrine which counsel endeavor to deduce from it,—that the insurgent states, by the act of rebellion, and by levying war against the nation, became foreign states, and their inhabitants alien enemies."

I have thus taken much pains to ascertain if this pretension of the appellees could derive any support from the decisions of the supreme court. It seemed to me, under the circumstances, a strange quarter to seek for it; for if it can be found there, it must be allowed that this august tribunal has gone far towards rehabilitating the doctrine of secession, and giving life to the Confederacy in its ashes. And for what ends of justice, I demand to know, are we required to vamp up this obsolete theory of a separate and independent existence of the late Confederacy? The parties to this controversy were citizens of this Confederacy; and contracting under that faith, what merit have the appellees in this defense? It must be allowed that this defense is curiously constructed; it consists in part of the law of nations, and in part of the municipal law; of the former, so far as the incapacities growing out of international war are concerned; and of the latter, when it becomes necessary to invoke it for the reannexation of New Orleans—a part of the confederate territory—to the United States. Upon the theory of a separate confederate nationality, no act of mere military occupation, nor law of the Congress of the United States, could avail to withdraw this city from its sovereign so as to make its inhabitants, for purposes of contract, alien enemies to other subjects of the same sovereign; although under the doctrines of *The Hoop* and *the Bella Guidita*, 1 C. Rob. 196, 207, already cited, it might not be allowable for the latter to ship supplies to the former.

If required, then, to stand exclusively upon their theory of

an international war, unassisted by the laws of Congress, the appellees and all the other parties in interest to this controversy, including the Canal and Banking Company of New Orleans, would be inhabitants and citizens of one common country; and there could be no pretext for imputing the relations of alienage or hostility to any. But, to make out this defense, another ingredient is wanted, and that is found in the laws of Congress and the proclamation of the President of the United States, whereby New Orleans is transferred from the dominion of the Confederacy to that of the United States. Such a mixed and incongruous plea, therefore, does not challenge my particular regard, nor offer any peculiar temptation to be seduced into the avowal of doctrines that might prove hazardous to the business of life in times of civil commotion. For my part, I feel it to be a duty within my province to protect, as far as practicable, the contracts of men from being affected by internal disturbances, so that the stream of commerce may not be impeded or diverted, nor the faith of contracts dissolved by intestine wars.

If I have not erred in the positions I have so far advanced, I have succeeded in excluding this case from the pale of the law of nations. I am therefore relieved from the necessity of saying anything as to the numerous authorities that were cited on this head. I read them all with an interest and attention due to the gravity of the doctrine, and its able and satisfactory exposition in these cases; but, in my view, they have no legitimate application to this case.

Let us now turn to the only remaining branch of our inquiry, and see whether this action is defeated by the law of Congress. It may seem hard to subject a contract between confederates during the war to an act of Congress, of which, it is reasonable to suppose, they might not have had cognizance; but such a consequence necessarily attends the overthrow of the usurped governments. The act in question (July 13, 1861) authorized the President by proclamation to declare the inhabitants of any state, or part thereof, to be in a state of insurrection against the United States, whereupon "all commercial intercourse by and between the same, and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful, as long as such condition of hostility shall continue." This act was followed on the 16th of August, 1861, by the proclamation of the President, declaring among other things "that all commercial inter-

course, etc., is unlawful, and shall remain unlawful until such insurrection shall cease, or has been suppressed." The effect of these two measures was to suspend intercourse during the continuance of hostilities. I shall not stop to inquire what was the character of "the commercial intercourse" thus prohibited,—whether it was aimed at the negotiations of trade as within the mischief, or merely at the locomotive commerce, as more palpably indicated by the context, which is restricted to "all goods and chattels, wares and merchandise." I am willing to concede, in view of judicial decisions upon the cognate doctrine in the law of nations, that the interdiction was leveled at all contracts that might tempt to the violation of this prohibitory policy. But it is indispensable to discriminate between the edict of international law and the terms of this statute. The former, we have seen, annulled all contracts within the prohibited class, so that no action could be maintained upon them after the termination of the war; not so, however, with this act of Congress; it is merely suspensory. Had Congress thought proper to follow the law of nations in this respect, it could and would have done so; but in a tender and considerate deference, doubtless, to the peculiarities of the conflict, it chose a milder course, and merely suspended the right and the remedy during hostilities. It did not simply declare "commercial intercourse" unlawful, and stop there, leaving it to be inferred, as an intendment of law, that every act of such intercourse was therefore void, and incapable of supporting an action after the war, but the prohibition is made to depend upon "the condition of hostility," so that when the latter ceases, the former is removed, and a contract, unlawful in its inception, ceases to be so upon the return of peace. This, I take it, is the plain and unambiguous meaning of the act.

This bill was purchased by the appellant in February, 1862, when New Orleans, where it was payable, had reverted to the United States. Grant that this transaction was unlawful at that time, the illegality was temporary and contingent, for both the law and the proclamation declared that it should cease with the suppression of the insurrection. No step need to have been taken before that time to fix the liabilities of the parties to the bill. Had there been an understanding that this negotiation should await the termination of the war, it would have been as innocent as an assignment for value of the obligation of a debtor within the federal lines. But there

is no proof in this case of any purpose on the part of Billgerry to present or collect this check across the lines of contending armies. On the contrary, his conduct bespeaks a different purpose. He quietly remains at his home till the advancing waive of conquest passes over him and opens communication for him with New Orleans. He then duly presents his bill, and upon non-payment has it protested, and attempts to give notice thereof in the accustomed mode. But his right of action was still in abeyance, because his indorsers were separated from him by a line of bayonets. This continued to be the case till the insurrection was finally broken and suppressed by the surrender of Lee. Then his rights and remedies awoke from their state of suspended animation, and were endued with as much power and life as if the municipal law had never suspended them. It seems to me that this is a just and accurate interpretation of the terms and spirit of the law, and fully sustains the present cause of action.

The undertaking or agreement of the appellees as indorsers, however, was collateral and contingent. To hold them responsible, due and reasonable diligence must be shown in giving them notice of the dishonor; so that they might enjoy every conceivable opportunity and facility of securing themselves from loss. The question of due diligence is one of law, and is well settled by a numerous train of authorities. The party whose duty it is to give this notice is bound to due and reasonable diligence; but it is not required of him to see that the notice is brought home to the party. If it is given in the usual way and in reasonable time, it is sufficient to excuse the party on whom it rests, though it may never be received: 1 Am. Lead. Cas. 396, and note. But an omission to give this notice may be excused by circumstances rendering it impossible to do so. But the excuse is contemporaneous with the obstacle, so that upon the removal of the latter the duty revives. The pendency of war is an adequate excuse: 1 Parsons on Contracts, 278; *Hopkirk v. Page*, 2 Brock. 20. Here, then, there was no duty to give notice till the war ended. It is not, therefore, material to inquire into the validity of the notice that was mailed along with the protest in October, 1863, when there was no mail communication with Virginia. It was perhaps futile and supererogatory. But was this notice given in the usual way, and in due time after this impediment was removed? The proof is, that about two weeks after the surrender of Lee's army, the appellant wrote a letter to

Branch and Sons from New Orleans, informing them of the protest of the bills; and it was just at that time, as is proven by a special agent of the post-office department, that mail communication was first opened from within the United States lines to Richmond or Petersburg. This, therefore, brings the appellant within the rule that charges his indorsers, and fixes their liability to him on their collateral undertaking for the honor of the bills which they sold him.

On the whole, therefore, it seems to me that the demurrer to the amended declaration should have been overruled, and judgment given for the plaintiff's demand.

JOYNES. J. The counsel for the defendants have contended in the argument, — 1. That the contracts arising out of the indorsement and delivery of the checks by the defendants to the plaintiff were illegal and void, so that no action could be founded upon them; 2. That if these contracts were legal and valid, there has been no sufficient presentment and demand of payment of the checks; and 3. That if the presentment and demand were sufficient, there has been no sufficient notice of dishonor.

Premising that a check is a bill of exchange, though subject to some peculiar rules, which need not be now adverted to, and that every indorsement of a bill is equivalent to the drawing of a new bill, I proceed to consider the first and principal question.

It is a general principle of law that war operates as an interdiction of all commercial and other pacific intercourse and communication with the public enemy; and it follows, as a corollary from this principle, that every species of private contract made with subjects of the enemy during war is unlawful. "The rule thus deduced," says Wheaton, "is applicable to insurance on enemy's property and trade; to the drawing and negotiating of bills of exchange between subjects of the powers at war; to the remission of funds in money or bills to the enemy's country; to commercial partnerships entered into between the subjects of the two countries after the declaration of war, or existing previous to the declaration, which last are dissolved by the mere force and act of the war itself, although as to other contracts [existing before the war] it only suspends the remedy": Wheaton's *Elements*, by Lawrence, 556. So Kent says: "The insurance of enemy's property is an illegal contract, because it is a species of trade and intercourse with the enemy. The drawing of a bill of ex-

change by an alien enemy, on a subject of the adverse country, is an illegal and void contract, because it is a communication and contract. The purchase of bills on the enemy's country, or the remission and deposit of funds there, is a dangerous and illegal act, because it may be cherishing the resources and relieving the wants of the enemy. The remission of funds in money or bills to subjects of the enemy is unlawful. The inhibition reaches to every communication, direct or circuitous. All endeavors at trade with the enemy, by the intervention of third persons, or by partnerships, have equally failed, and no artifice has succeeded to legalize the trade without the express permission of the government. Every relaxation of the rule tends to corrupt the allegiance of the subject, and prevents the war from fulfilling its end. The only exception to this strict and rigorous rule of international jurisprudence is the case of ransom bills, and they are contracts of necessity, founded on a state of war, and engendered by its violence": 1 Kent's Com. 67, 68.

The same great jurist uses this language in *Griswold v. Waddington*, 16 Johns. 438: "There is no authority in law, whether that law be national, maritime, or municipal, for any kind of private, voluntary, unlicensed business communication or intercourse with an enemy. It is all noxious, and in a greater or less degree is all criminal. Every attempt at drawing distinctions has failed; all kind of intercourse, except that which is hostile, or created by the mere exigency of the war and necessity of the case, is illegal. The law has put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special permission of the government. There is wisdom and policy, patriotism and safety, in this principle, and every relaxation of it tends to corrupt the allegiance of the subject, and prolong the calamities of war.

"The idea that any remission of money may be lawfully made to an enemy is repugnant to the very rights of war, which require the subjects of one country to seize the effects of the subjects of the other. The property so remitted, if in cash or any tangible subject, would become a just cause of the seizure while on its passage. An alien enemy has no right of action during war, and he cannot sue, because it would be drawing resources out of the country. How, then, can it be lawful to make remittances to him? The law that forbids intercourse and trade must equally forbid remittances and pay-

ment": See Halleck on International Law, 356 et seq.; note to *Clementson v. Blessig*, 11 Ex. 135; S. C., 26 Eng. L. & Eq. 544.

In *Willison v. Pattison*, 7 Taunt. 439, 2 Eng. Com. L. 167, S. C., 1 J. B. Moore, 133 (which latter report of it I will cite, as it is much fuller and better every way than the other), was an action of *assumpsit* on three bills of exchange accepted by the defendants, and indorsed to the plaintiff. They both were drawn at Dunkirk, in France, by Michelin, a subject of France, resident there, payable to his own order three months after date, upon the defendants, British subjects, resident in London, who were the holders of certain cambrics, shipped to them by Varlet, of Dunkirk, and by him assigned to Michelin. The bills were accepted, payable when the cambrics should be sold, which were subsequently done. The bills were indorsed by Michelin, the drawer, to the plaintiff, an English-born subject, then and still a resident of Dunkirk. At the time these bills were drawn, indorsed, and accepted, France and England were at open war with each other. The action was brought after the return of peace, and the court held that it could not be maintained.

Gibbs, C. J., thus states the propositions maintained by the respective counsel in the argument: "My brother Best has contended that all communication with an alien enemy during war must be prohibited, as the policy of law thereby secures this state from all dangers to be apprehended from a foreign country, and that in order to prevent all communication with a foreign enemy, he has insisted that if subjects of a foreign state draw bills on persons in this country, and seek to enforce payment thereon, the mischief is incurred. He has further insisted that this was a direct trading. This, however, my brother Lewis has denied, and contended that the mere drawing or indorsing bills is not such a communication with an enemy as is contravened by the general policy of law." And the chief justice, in giving the reasons of his judgment, said: "It is illegal for an alien, in an enemy's country, during war, to draw a bill on a subject resident in this, and then sue him here for the amount of such bill on the restoration of peace. It gives rise to a communication between subjects of both countries, which ought to be avoided. The drawing and accepting these bills are in themselves illegal." Park, J., after quoting the rule, *Ex natura belli commercia inter hostes cessare non est dubitandum*, adds: "Although the evidence of trading is not conclusive, it is still a trading. . . . Though

the plaintiff might be in ignorance of the circumstances attending these bills, still he receives them from the drawer, and must therefore be fully aware that they were a species of contract originating with an alien enemy." Burrough, J., said: "It was the object of the drawer in the present case, who was an alien, to obtain money from the acceptors, who were residents in this country. The drawer, having assigned [consigned?] the cambrics to the acceptor for sale, is entitled to the money arising on the bills. Can it be contended that if the cambrics had been sold, Michelin could have maintained an action for money had and received? If not, he could by no device obtain it from this country. If, therefore, the action for money had and received could not be maintained by Michelin, being an alien enemy, can he possibly transfer his interest to another, which interest will ultimately revert to his benefit?"

In *Willison v. Pattison*, *supra*, there was an actual communication had and a contract directly made between subjects of the hostile powers, inasmuch as the bill was sent over from France to England for acceptance, and was accepted. But it is not necessary that any such actual communication should take place in order to vitiate the contract of the drawer or indorser of a bill. When a man draws a bill upon another and negotiates it, he in substance and fact dispatches a communication to him, directing him to pay the money to the owner of the bill. The drawing and negotiation of the bill have a direct tendency to bring about actual intercourse and communication, because the bill cannot otherwise perform its office. And upon general principles, any contract is unlawful which has a tendency to promote and encourage the doing of an act which the law condemns and forbids, whether in any particular case the act be really done or not. Upon this ground, the vice attaches to the drawing and negotiation of the bill. The other ground of decision stated by Burrough, J., namely, that the bill is an attempt by the drawer to transfer to another a right to demand and receive money which he could not lawfully demand himself, leads to the same result. Obviously, if the drawer may lawfully draw for his funds in the hands of the drawee, the drawee may lawfully pay the drafts or remit the funds. But, as we have seen, the payment or remittance of money by a subject or citizen of one belligerent to a subject or citizen of the other, during war, is unlawful: *Griswold v. Waddington*, *supra*.

But it was contended with great earnestness and ability by the counsel for the plaintiff that the rights of the parties in this case must be determined with reference to the municipal law alone; that the late conflict between the United States and the Confederate States was not a war in the legal sense, and did not produce the effects of a war upon the rights and relations of citizens; that on the part of the Confederate States it was nothing more than an insurrection or rebellion against the lawful authority of the United States, and on the part of the United States was only an exertion of force to suppress the insurrection; and that the principles of international law, applicable to a war *inter gentes*, cannot properly be resorted to for the determination of any question between citizens arising out of that conflict or affected by it. It was further argued that the only restriction upon intercourse during the war was that imposed by the act of Congress of July 13, 1861, and the proclamation of August 16, 1861, which was merely a suspension for a time of the right of free intercourse guaranteed by the constitution; and that the existence of the conflict between the government and the insurgents, and the suspension of intercourse during its existence, did not deprive any citizen of the right to draw a bill of exchange upon another citizen, or any other citizen of the right to purchase such a bill, even though the drawer and drawee were on opposite sides of the conflict, such acts not involving any actual locomotive intercourse, which would alone violate the prohibition against intercourse; and that in order to defeat a recovery in this case, it was incumbent on the defendants to establish that there has been a violation of that prohibition.

I shall not enter upon a discussion of the theory and principles of the constitution of the United States, or of the respective rights and powers of the federal and state governments, for the purpose of determining the political and constitutional character and consequences of the late unhappy conflict. Fortunately, such a discussion is not necessary. The principles of law which are to be applied to the solution of the question now before us seem to me to have been fully settled by the supreme court of the United States. I do not think it necessary to cite the decisions of any inferior tribunal, and shall cite only a few cases in the supreme court.

The subject of the late war first came before the supreme court in the *Prize Cases*, 2 Black, 635, decided at December term, 1862. These cases involved the validity of certain captures

for breach of the blockade established by President Lincoln in April, 1861, at a time when no legislation had been had by Congress in reference to the war. Four vessels were involved, two of which belonged to neutrals, and two to citizens of Richmond, Virginia. Two questions were discussed and decided by the court: 1. Had the President a right to institute a blockade of ports in the possession of persons in armed rebellion against the government, on the principles of international law? 2. Was the property of persons domiciled or residing within the states in rebellion a proper subject of capture on the sea as "enemies' property"?

The court, after observing that the right of prize and capture depended on the *ius belli*, proceeded to inquire whether, at the time the blockade was instituted, a state of war existed between the United States and the insurgents. If these relations, existing under the constitution, between the government and the insurgents, had the effect of rendering it impossible that a conflict between them could be a war in the legal sense, and of restricting the government to the use of means provided by the municipal law for the suppression of an insurrection, then the blockade was not lawfully instituted. In order, therefore, to determine the validity of the blockade, it was necessary to determine what was the legal character of the relations existing between the parties to the conflict.

The following extracts from the opinion will exhibit the views of the court:—

"The parties belligerent in a public war are independent nations. But it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist when one of the belligerents claims sovereign rights as against the other. . . .

"A civil war,' says Vattel, 'breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. These two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest, and have recourse to arms.' . . .

"The true test of the existence of civil war, as found in the writings of the sages of the common law, may be thus sum-

marily stated: 'When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land.'

"It is not the less a civil war with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or state be acknowledged, in order to constitute it a party belligerent in a war according to the law of nations.

"The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit, that insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies, because they are traitors, and [that] a war levied on the government by traitors, in order to dismember and destroy it, is not a war, because it is an 'insurrection.'"

Pursuing these views, and others which need not be adverted to, the court held that there existed between the government of the United States and the insurgents a state of civil war, in the sense of the international law, which brought with it the common incidents of war, and among them the right to institute a blockade.

The views of the court upon the second question will appear from the following extracts:—

"The appellants contend that the term 'enemy' is properly applicable to those only who are subjects or citizens of a foreign state at war with our own. . . . They contend also that insurrection is the act of individuals, and not of a government or sovereignty; that the individuals engaged are subjects of law; that confiscation of their property can be effected only under a municipal law; that by the law of the land such confiscation cannot take place without the conviction of the owner of some offense; and finally, that the secession ordinances are nullities, and ineffectual to release any citizen from his allegiance to the national government, and consequently that the constitution and laws of the United States are still operative over persons in all the states for punishment as well as protection."

The court proceeded to show that the claim of sovereignty on the part of the United States did not prevent the exercise of belligerent rights, or the existence of belligerent relations, and added:—

"All persons who reside within [the insurgent] territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance, and made war on their government, and are none the less enemies because they are traitors."

The four dissenting judges held that war, in the legal sense, did not exist at the time the blockade was instituted, because it had not been declared by Congress. They held that prior to the act of Congress of July 13, 1861, the President could only exercise the powers given to him by the municipal law, his operations being limited to the suppression of an insurrection, but that Congress could bring into operation the war power, and thus change the nature and character of the contest; and that after such action by Congress, instead of being carried on under the municipal law, it would be carried on under the law of nations and the acts of Congress as war measures, with all the rights of war: *Prize Cases*, 2 Black, 692. They not only held that such a contest, after the action of Congress, would give to the government the rights of war under the international law, but that it would likewise be attended with the consequences of war in respect to the rights and relations of citizens: *Prize Cases*, 2 Black, 688, 693. On page 687, the consequence of a state of war, according to the international law, are stated. They are referred to as consequences which must result from regarding the pending conflict as a civil war. The judge says: "The people of the two countries become immediately the enemies of each other; all intercourse, commercial or otherwise, unlawful; all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange, or the purchase [of bills] on the enemy's country, the remission of bills or money to it, are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved,—and in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete, by the mere force and effect of war itself."

The only point upon which the minority differed from the

[illegible]

In *The Venice, I Wall 258*, the court held that transactions were in progress. The court held that states of Louisiana and Mississippi were under the dominion, and all the people of those states were the citizens of the United States. The court held that all the citizens of sufficient age and capacity were qualified to vote, and of all other citizens of legal age and capacity equally to civil and political rights. This relation of natural conditions of a state of war for the government of necessity.

This relation of mutual dependence is the basis of the conditions of a state of war. It is the basis of the necessity, and which has its origin in the fact that subjects individuals to the state. It is the basis of the acts and contracts, without which the state is impossible. The relation of the numerous sides in the state is that of freedom, and the state is the only one that is possible under the conditions of freedom. It is the only one that is possible for the time, by new relations, and so the rights and powers in respect to the state.

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majority was in respect to the time at which the conflict assumed the character of a war in the legal sense. The majority held that the conflict had become a war by the mere course of events, and without any action by Congress, while the minority held that the action of Congress was indispensable to give it that character. But there was no difference of opinion in respect to the legal consequences resulting from the state of war, whenever the conflict assumed that character.

In *The Venice*, 2 Wall. 258, the court says: "While these transactions were in progress, the war was flagrant. The states of Louisiana and Mississippi were wholly under rebel dominion, and all the people of each state were enemies of the United States. The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the government, and of all the citizens or subjects of the other, applies equally to civil and to international wars."

This relation of mutual enmity is one of the fundamental conditions of a state of war. It is part of a system of rules for the government of men in a state of war, which is founded in necessity, and which has been established by common consent throughout the world. That system, as we have seen, subjects individuals to restraints and disabilities in respect to their acts and contracts, which are unknown in time of peace. The relation of the citizens of the several states under the constitution is that of friends; the relation between citizens on opposite sides in the late war was that of enemies. The relations under the constitution were suspended, and superseded for the time, by new relations under the laws of war. And so the rights and privileges existing under the constitution, in respect to intercourse and contracts, were displaced and superseded, for the time, by the restraints and disabilities which resulted from the state of war.

In *The Hampton*, 5 Wall. 372, the vessel was captured in a creek in the state of Virginia, and was libeled and condemned as prize of war, upon the principles of the international law Brinkley, a loyal citizen, appeared and claimed the vessel as mortgagee. The *bona fides* of the mortgage were not disputed, nor was it disputed that he was a loyal citizen. The precise offense for which the vessel was libeled is not stated in the report, but it was conceded that the vessel might have been condemned under the act of July 13, 1861. The offense, therefore, was one embraced by that act, which provides that goods, etc.,

coming from or going to a state in insurrection, by land or water, along with the vessel, etc., in which they are, shall be forfeited.

It was held that the vessel was properly condemned under the international law, which was not superseded by the act of Congress, and that, notwithstanding the loyalty of the mortgagee, and the fairness of his debt, his right was forfeited upon the principles of international law, though it would have been saved if the condemnation had taken place under the act of Congress.

This case, therefore, decides,—1. That intercourse during the late war was unlawful upon the principles of international law, and independently of the act of Congress; and 2. That the effect of the international law was to override and extinguish the claim of a loyal citizen, under a *bona fide* mortgage.

In *The William Bagaley*, 5 Wall. 377, Bragden, who claimed a share of the vessel and cargo, was a loyal citizen, resident in Indiana. At the breaking out of the war he was a member of a mercantile partnership in Mobile, which owned the vessel and cargo. He never aided the rebellion; never, after the rebellion began, exercised any control or ownership over the vessel or cargo; and had no connection with or knowledge of the unlawful voyage which occasioned the capture. In consequence of his loyalty to the United States, his interest in the partnership effects had been confiscated by the confederate government. His claim was rejected. The court held, among other things, that the effect of the war was to dissolve the partnership existing between the claimant and the parties in Mobile, and that it was his duty promptly to dispose of and withdraw his interest, and that by his failure to do so, his interest became liable to be treated as enemy's property. These propositions were based exclusively on the principles applicable to international laws. The court farther recognized the principle, applicable to war *inter gentes*, that an executory contract with a citizen or subject of the enemy, if it cannot be performed except in the way of commercial intercourse with the enemy, is *ipso facto* dissolved, as equally applicable to the late civil war.

In *Hanger v. Abbott*, 6 Wall. 532, the principle of law applicable to a state of war *inter gentes* were applied to the late civil war, to determine whether the statute of limitations of Arkansas ran, during the war, against a cause of action held at the commencement of the war, by citizens of New Hamp-

shire against a citizen of Arkansas. In the opinion of the court, the ordinary consequences of a war *inter gentes*,—the prohibition of intercourse, the dissolution of partnerships, the prohibition of contracts made during the war and the suspension or dissolution of contracts made before the war, the right to confiscate debts due to citizens or subjects of the enemy, the suspension of the remedy for the recovery of debts, and the restoration of the remedy upon the return of peace,—were fully stated, and were recognized as equally applicable to the late civil war. It was accordingly held that the act of limitations did not run during the war. And this decision was placed exclusively upon the principles of international law applicable to a state of war *inter gentes*.

These decisions of the supreme court settle beyond question that the late conflict between the United States and the Confederate States was a war, in the legal sense, with all the incidents and consequences of a war, as they are known to the international law; that accordingly all the citizens on one side were enemies of all the citizens on the other, and that all commercial or other pacific intercourse or communication between them, unless specially authorized, was unlawful, to the same extent and for the same reasons as in a war *inter gentes*, and that in order to determine how the contracts of individual citizens were affected by the late war, recourse must be had to the general principles applicable to a state of war, as they are found in the international code.

This doctrine by no means involves a recognition of the Confederate States as a political sovereignty. The concession by the government of belligerent rights to the Confederate States, and the application by the courts of the general laws of war, to the determination of questions arising out of the conflict, only recognize the existence of a conflict of such magnitude, and with such an array of strength, that it could not be dealt with otherwise than as a war; they involve no concession of political rights to the association of states which carried on the conflict.

Nor does the fact that Louisiana was one of the Confederate States, and that the city of New Orleans was to the last claimed by the Confederate States as belonging to them, afford any ground for refusing to apply the law of war to this case. The checks were drawn and indorsed after the city of New Orleans had passed under the permanent dominion and control of the United States. Its relation to the Confederate

States, which were only a government *de facto*, and whose authority was therefore dependent upon the exercise of power, and not upon the existence of right, were thus broken up and destroyed. From that time we must regard New Orleans as belonging to the federal side of the conflict, and its citizens as enemies of the citizens of the other belligerent: *The Ouachita Cotton*, 6 Wall. 521, and cases cited. Nor does it make any difference that the plaintiff and defendants were all of them citizens of the Confederate States, if, as claimed by the defendants, the contract between them was in violation of the common law of the civilized world.

I do not think it necessary to consider whether, as contended by the counsel for the plaintiff, the act of Congress of July 13, 1861, and the proclamations of the President in pursuance of it, prohibiting commercial intercourse, were a law to the parties to this suit at the date of their contract, all of whom were then citizens and residents of the Confederate States. If they were, it would not follow, as contended by the counsel, that actual locomotive intercourse was necessary in order to affect the contract between these parties. Such actual locomotive intercourse, accomplished or attempted, would doubtless be necessary, as under the general law of war, to subject property to forfeiture. But the prohibition of intercourse, thus made by Congress, must be construed with reference to the object it was designed to effect, and so enforced as to accomplish the policy on which it was founded. It was obviously dictated by the same policy, and designed to effect the same ends, as the like prohibition in the international law, and any contract which would be regarded as a violation of the one ought to be regarded as a violation of the other.

But even if this act of Congress did not operate as a law to the parties to this suit, at the date of their contract, I apprehend that no court of the United States, or of a state, should lend its aid for the enforcement of a contract made in violation of the policy of that act. This court must deal with this case just as a court of the United States would deal with it.

The argument that Billgerry had a right, which was guaranteed to him by the constitution, to go to New Orleans at his pleasure, which was only suspended by the war, seems to me to have no force. The suspension was accompanied by an absolute interdict of all commercial intercourse in the mean

time, and a consequent disability to enforce any contract made during the war, which tended to produce a violation of that interdict. The interdict was as absolute while it lasted, and as fatal to all contracts in violation of its policy, as if it had been perpetual, or as if there had been no such general right of intercourse under the constitution.

It was argued, too, that Billgerry might have intended to keep these checks until it should become lawful to present them for payment, and that the court ought rather to presume a lawful than an unlawful intent. I doubt whether a party who makes a contract during war, which, upon its face, and according to the usual intent and import of such contracts, is a violation of the policy of non-intercourse, ought to be allowed to say that he did not design any such violation. It would be difficult to determine whether such an averment was founded in truth, and to permit such defenses to be alleged would cripple the efficiency of the rule, which, we are told, admits no exceptions: *Hanger v. Abbott*, 6 Wall. 535; and which declares "a strict and rigorous" policy, which no artifice is permitted to evade.

But what are the facts? Billgerry parted with his money to Branch and Sons, in February, 1863. He would necessarily lose interest until he could collect the money on the checks. He has been examined as a witness, as have also the only two of the defendants who were cognizant of the transaction. Neither of them testifies that there was any understanding or expectation that the presentment of the checks would be withheld, much less any contract that they should be withheld, until it should be lawful to present them. On the contrary, John R. Branch, who conducted the transaction with Billgerry, shows his understanding and expectation, when he says that he "judged Billgerry to be a blockade runner." And not only does Billgerry nowhere say that there was any understanding with Branch, or any intention on his own part that presentment would be delayed, but he admits that after he bought the checks he tried to find somebody by whom he could send them to New Orleans for collection, but could not. The checks, indeed, seem to have remained in Virginia from August, 1862, when they were drawn, to February, 1863, when they were sold to Billgerry. But that fact throws no light on the contract between Billgerry, and Branch and Sons. It may be accounted for by supposing that nobody had been found in that interval who wanted funds on New Orleans, or

who would pay enough for them. When we remember how much activity and enterprise were displayed during the war in "running the blockade," and the large profits that were made by it, we should require pretty strong proof to convince us that a party who drew a sight draft on a point where federal money was to be had contemplated that it would be withheld from presentment for an indefinite period of the war, or that a party who laid out a large sum in the purchases of such a draft intended so to withhold it.

It follows from these views that, upon the evidence, the judgment was properly rendered for the defendants. They also show that the demurrers to the special counts were properly sustained. Each of those counts sets out the drawing of a check by a bank in Richmond upon a bank in New Orleans, and the indorsement of the check by the defendants to the plaintiff, at periods when we know that the war was flagrant, and all commercial and other intercourse between Richmond and New Orleans were unlawful.

But even if the contract could be held valid, there is another ground which is fatal to the case of the plaintiff, both upon the pleadings and the evidence. In order to charge the defendants as indorsers, it was necessary that the checks should be presented to the Canal Bank, and payment thereof demanded; and in case of dishonor, that due notice thereof should be given to the defendants. The only presentment and demand set out in the pleadings, or proved by the evidence, were made on the twenty-seventh day of October, 1863, when all commercial intercourse between Vicksburg, where the plaintiff resided, and New Orleans, where the checks were payable, was unlawful. By the proclamation of the President, dated August 16, 1861, prohibiting intercourse with the states in rebellion, an exception was made of "such parts of states as may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents." This exception is set out in the amended declaration, and was relied on in the argument as authorizing Billgerry to go to New Orleans after the fall of Vicksburg. But this exception was repealed by the proclamation of April 2, 1863. That proclamation declared the same states to be in insurrection, and revoked all the exceptions made in the former proclamation; but again made certain local exceptions, of which "the port of New Orleans" was one. This proclamation declares "that all commercial intercourse not

licensed and conducted as is provided in said act between the said states and the inhabitants thereof, with the exceptions aforesaid, is unlawful, and will remain unlawful until such insurrection shall cease, or has been suppressed, and notice thereof has been given by proclamation." Vicksburg was not excepted from the operation of this proclamation, so that commercial intercourse, except with the license of the President, between Vicksburg and New Orleans was unlawful at the time at which presentment of these checks was made. The license given to Billgerry by the military authorities was a nullity: *The Ouachita Cotton*, 6 Wall. 521.

The demand of payment therefore which was made was one which the plaintiff could not lawfully make, and which the Canal Bank could not lawfully comply with. A demand to charge the indorsers should have been one which the bank might lawfully have complied with.

In respect to the question of notice of dishonor, very little need be said. To give any effect to the notice deposited in the post-office in New Orleans, in October, 1863, it should at least have been shown that the law, or a general usage, required that the letter containing the notice should be preserved by the postmaster until the restoration of intercourse, and then forwarded to its destination. In the absence of such proof, the deposit of a notice in the post-office at New Orleans, addressed to Petersburg in the midst of the war, was of no avail. It is not necessary to express an opinion as to whether the evidence is sufficient to prove that due notice was given to the defendants after the close of the war.

Upon the whole, I am of opinion that the judgment ought to be affirmed.

MONCURE, P., concurred in the opinion of JOYNES, J.

Judgment affirmed.

ALL CONTRACTS BETWEEN BELLIGERENTS ARE VOID: *Mims v. Armstrong*, 97 Am. Dec. 472, and note 475; *Kerkow v. Kelsey*, 97 Id. 124, and note 140. The principal case is cited to the point that all commercial intercourse and all contracts between the subjects or citizens of opposing belligerents are wholly invalid: *Phillips v. Hatch*, 1 Dill. 577.

LATE REBELLION WAS WAR, AND RULES OF INTERNATIONAL LAW MUST BE APPLIED in determining the rights and relations of residents of the Confederacy and of the United States: *Lewis v. Ludwick*, 98 Am. Dec. 454, and note 458; *Sutton v. Tiller*, 98 Id. 471, and note 474. The principal case is cited to the point that belligerent rights are the same in civil and foreign wars, and the rules of international law apply to both: *Hubbard v. Harnden Express Company*, 10 R. I. 250.

DEMAND AND NOTICE, HOW FAR EXCUSED BY EXISTENCE OF WAR: *Poll v. Spinks*, 98 Am. Dec. 426, and note 428. A state of war which intercepts intercourse by the ordinary and usual course of mail between the holder and indorser of a note excuses the holder from giving notice of dishonor so long as such interruption continues; but diligence on the part of the holder requires that he should forward notice to the indorser as soon as the interruption ceases; and a mere deposit of notice of dishonor in the post-office, addressed to the indorser, during the interruption and suspension of mail communication, will not operate to charge the indorser: *Farmers' Bank v. Gunnell*, 26 Gratt. 138, citing the principal case. The case of *McVeigh v. Bank of the Old Dominion*, 28 Id. 801, is distinguished from the principal case on the ground that the action was not upon the check, but upon the note, "to which the money on which the check was drawn was applied as a credit."

WASHINGTON ETC. R. R. Co. v. ALEXANDRIA ETC. R. R. Co.

[19 GRATTAN, 592.]

REMOVAL OF CAUSE, STATUTORY PROVISIONS RELATIVE TO.—Act of Congress, March 2, 1867, providing for the removal of a cause from a state to a federal court, where either party believes he will not obtain justice in the state court, because of prejudice, etc., merely extends the privilege of removal to the plaintiff as well as to the defendant, and does not repeal the previous act of July, 1866, providing for such removal in cases of citizenship of different states, on the petition of the defendant, etc.

STOCKHOLDERS IN CORPORATION WHICH IS DEFENDANT TO SUIT IN EQUITY, SEEKING TO HAVE IT DECLARED NULL, are not proper parties to defend the suit, but may be admitted as parties defendant to protect equitable interests claimed by them in the property, in case the corporation is annulled.

VIRGINIA COUNTY COURTS ARE COURTS OF GENERAL JURISDICTION in all civil causes, and it is to be presumed, in the absence of proof to the contrary, that the court had jurisdiction of the particular case. When the face of the record discloses the want of jurisdiction, the presumption will not arise.

TRUSTEE, SUBSTITUTION OF, TO FILL VACANCY.—A railroad company's deed of trust of its property, made to secure certain bonds, provided that if the trustee should become incapable of acting, any court of record of a certain county, upon application of three fifths of the bondholders, and notice to the president or any director of the company, might appoint another trustee. The trustee, president, and directors went into the enemy's lines, and remained there during the war of the Rebellion. *Held*, that an order of the county court, substituting another person as trustee, without notice, and a sale by such substituted trustee, were utterly void.

TRUSTEE IN DEED TO SECURE DEBTS, WHO IS ATTORNEY AT LAW AND IS FACT OF CREDITOR, cannot make a valid sale of the property to himself.

CORPORATION CANNOT BE CREATED BY MERE ACQUIESCENCE, but only by positive act of legislation, or by some power thereto authorized by a legislative act.

THE Alexandria and Washington Railroad Company was chartered by the legislature of Virginia in 1854, and one French made president. In August, 1854, said company was authorized by act of Congress to purchase and hold lands in the District of Columbia, and to lay a track through such streets as the corporate authorities of Washington might approve. In 1855, said authorities authorized the company to lay its track on an avenue, from the Long Bridge to the Baltimore depot, and guaranteed its bonds of \$60,000, for which, in April, 1855, the company executed a deed of trust on all its property. The track was laid from Alexandria to the Long Bridge, and the road operated until the spring of 1861. In December, 1856, a second deed of trust was made upon the property of the company, to one Kinzer, trustee, to secure Fowle, Snowden, & Co. \$14,849.50, on which was paid \$8,348.14. In July, 1857, a third deed of trust was executed to one Lenox, trustee, to secure \$30,000 in coupon bonds, which the company had authority to issue, and which were payable July 22, 1877, with semi-annual interest at seven per cent; and it was provided that, in default of payment of principal or interest, the road might be sold by giving at least sixty days' notice. And the deed further provided that in case of the death, incapacity, or resignation of the trustee Lenox, or of his successors, the office of trustee filled by him should become vacant, and should be filled by an appointment to be made by any court of record in the county of Alexandria, on application of the parties of the first part, or of the holders of three fifths of said bonds. Provided, however, in the last case, notice of the application of the parties making such request be given to the president or one of the directors of said company; and all the rights, powers, and authority conferred on the original trustee should then be invested in his successor or successors so appointed. This deed of trust in terms recognized the first deed of trust as an existing and prior lien. The bonds were sold to one Thornton, for ten thousand dollars, upon which was paid two thousand dollars in cash; and notes were given for the balance, upon which was paid about three thousand five hundred dollars, and the balance remained due. Said company was authorized by its charter to issue stock to the amount of three hundred thou-

sand dollars, but issued only to the amount of two hundred thousand dollars. There were various judgments and claims against the company, and the whole amount of its indebtedness on the 10th of April, 1862, was about one hundred and ninety-five thousand dollars. Of the judgments, one Hay claimed to be the owner of about forty thousand dollars in April, 1861; but it seemed that in August, 1860, he had assigned these judgments to French, president of the company, upon the payment to him of five thousand dollars, though it does not appear that this money was paid. By power of attorney executed at the same time, he authorized French to deal with such judgments as if they were his individual property. In May, 1861, the rolling stock of the company was transferred to the Orange and Alexandria railroad, and taken beyond the federal lines, and the president, directors, and the the trustee Lenox all went South at that time, and remained within the confederate lines, and the rolling stock was sold by said French to parties within said lines. The United States government took possession of the road in 1861, put it in good order, used it till the close of the war, and left it in good order and very valuable. Hay claimed that he took possession of the road early in 1861, and made a contract with the Secretary of War, by which the war department was to repair the road, and binding himself to defray the expenses of such repairs, which should not be discharged by the use of the road. The government used the road long enough to pay its outlays thereon. The defendant Stewart, an attorney at law, acted as attorney for Hay, and as such, or on his own account, during the year 1861, sold the iron of the company for more than ten thousand dollars, and received the money, but no account of it was ever made. On the 28th of January, 1862, one Davison, claiming to be the agent of Thornton for the coupon bonds said to be held by him, agreed with the said Stewart, authorizing him as attorney to close out and perfect the interest of said bond-holders in said road, and agreed to give him a contingent fee of one half of the whole amount received on said bonds in the sale of the same, or of the said road, over and above the sum of ten thousand dollars, and all the interest that the said bond-holders, or any of them, may have paid, or may have to pay on the said thirty thousand dollars of bonds, at the rate of seven per cent per annum; and on the next day said Stewart, as attorney in fact for said Hay, gave to said Davison an agreement in writing, that if a sale

should be made under said deed of trust, and the said road be purchased by himself or constituents, the said Thornton should have the right to continue his interest in the same according to the ratio of his present lien upon and demand against the same; and enjoy and receive a *pro rata* rate of all the appreciations of value or profits claimed from the future use or development of the same, and be created a stockholder accordingly. Davison, on the 3d of February, 1862, filed a petition in the county court of Alexandria County, sworn to by him, stating that he was attorney in fact of all the bondholders secured by the deed of trust to Lenox, claiming that said trustee had become incapacitated from performing said trust; that he had made diligent search for the president, or some director or agent of said company, to whom he could give notice, but could find none upon whom notice could be served, and asking that the said Stewart be appointed trustee. Upon the application, the county court made an order substituting Stewart as trustee in place of Lenox, on the 3d of February, 1862. On the next day, Davison requested the trustee to make sale of said road, and on the tenth day of February, 1862, a sale was advertised to take place on the tenth day of April following, on which day it was sold at public auction, and bid off by Hay for twelve thousand five hundred dollars. Hay assigned one half of his purchase to Joseph Thornton, and they agreed to continue as a corporation under the name of the Washington, Alexandria, and Georgetown Railroad Company. A conveyance was made to them, and to such company, of the road, and all the franchises and property of the Alexandria and Washington Company, by Stewart, as trustee. The organization of the new company was perfected on the third day of May, 1862, by the appointment of officers, the stock having been divided between Hay, Stewart, Davison, and Thornton. On the third day of May, 1863, Congress extended the charter of the old company, allowing it to occupy its present location on Maryland Avenue, in Washington, and to construct a bridge alongside of the Potomac bridge, upon certain conditions named. This charter was claimed to have been obtained at the instance of members of the new company, but it was not explained why, in terms, it was granted to the Alexandria and Washington Railroad Company. By an act of the Virginia legislature of January 23, 1864, the new company was authorized to issue stock to the amount of five hundred thousand dollars, to sell its bonds to the amount of two hundred thousand dollars, in ad-

dition to the one hundred thousand dollars allowed to the old company, and to borrow money upon its promissory notes to the amount of one hundred thousand dollars more. The defendants claim that with the proceeds of such stock, bonds, and notes, a large part of the indebtedness of the old company was paid; money was raised to procure the charter from Congress to build the bridge, repair and put the road in good order; and such stock is held by parties in Washington, New York, and Baltimore. The bill filed in April, 1866, by French, as president of the old company, against the new company, charged that the appointment of Stewart as trustee was null and void, and that the sale by him was without authority; that all the action of himself, Hay, Thornton, and Davison was the result of a fraudulent conspiracy on their part to obtain the road unlawfully; and that this, with the conduct of said Stewart in making such sale, ought to make the sale void. On the 22d of November, 1867, Coleman, Riddle, and others filed a petition representing themselves as the owners of a large majority of the stock of the new company, and asking that they be made parties defendant, which was allowed. On the 23d of December, 1867, it was adjudged that the whole proceeding of the county court of Alexandria County, substituting Stewart as trustee in place of Lenox, was without authority of law, and null and void; and that all the subsequent proceedings of the said Stewart, under said deed, were null and void, and should be set aside. And by the same decree a reference was made to the commissioner to inquire into the interests of said Coleman and others, and make further report to the court. On the 2d of June, 1866, the new company filed a petition alleging that the corporation was the only party having any real interest in the suit, except Stewart; that Hay was a citizen of Pennsylvania, and Stewart a citizen of Kentucky; and on the same day Stewart filed a petition alleging that he was a citizen of Kentucky, and that the company was made a defendant for the purpose of preventing a removal into the federal court; and upon said petitions, motion was made to remove the cause into the circuit court of the United States, which motion was overruled. The motion was renewed on the 6th of December, 1866, by Stewart and Hay, which was also denied. In May, 1868, two petitions for removal to the United States court were filed by said Coleman and others, each alleging their citizenship of Maryland and other states; one claiming that the validity of orders made by the Secretary of War and other

military officers in relation to said road was involved in the suit; and the others, that they, holding the majority of the stock of the new company, the existence of which as a company was denied by the bill, were the substantial parties defendants, and alleging that from prejudice and local influence they did not believe they would be able to obtain justice in the state court. They also filed answers at the same term. The motion upon these petitions was denied, and, against the protest of Coleman and others, a decree was made again declaring said order of the county court and the said bill null and void; and it appearing that liabilities had been incurred by the old and the new companies, that a large amount of stocks and bonds in excess of authority had been issued and sold, a reference was ordered to ascertain what equities might exist growing out of said transactions. From this decree, an appeal was taken.

R. J. Brent, John L. Brent, and Dulaney, for the appellants.

G. W. Brent, Bradley, and Gilmer, for the appellees.

By Court, WILLOUGHBY, J. The two leading questions presented for our decision are,—1. Ought the case, under the circumstance thereof, to have been removed on the petitions, or either of them, for such removal to the United States circuit court? 2. Was the sale made by the trustee, Joseph B. Stewart, valid? and did it operate to extinguish the Alexandria and Washington Railroad Company, and divest it of its corporate rights and privileges?

It would seem to me, without reference to the validity or invalidity of such sale, and without now passing upon the question of its right to be regarded as a corporation, consistent with legal principles to regard for the purposes of the decision of the points before us, the Washington, Alexandria, and Georgetown Railroad Company as a company capable of being sued, and of exercising certain powers.

This company certainly insists on being so regarded; it has acted as such with a full board of officers and directors, and as such has issued stock, bonds, and notes to a very large amount; it has been so recognized by the public; and transactions of great extent have taken place upon the faith of the existence of such company, and it was recognized as such by the act of assembly of January 23, 1864, by which large powers and privileges were granted to it "as a lawfully existing company."

The question regarding the petitions for removal seems to me to require our first consideration.

I will designate the two companies as the old and the new companies.

The bill as at first presented was brought by the old company against the new company, Hay, Stewart, Benjamin and Joseph Thornton, Davison, and the persons interested in the several deeds of trust.

Hay, in his answer, expressly waives all right to remove such cause as to himself, and Joseph Thornton and Davison protested against such removal.

The first petition was made by the new company. That this was properly overruled, it seems to me there can be no question. The old and the new companies were both residents and citizens of the state of Virginia; and I think it is equally plain that Stewart alone, under the law as it then existed, could not properly ask for a removal of such cause.

It had been settled that a suit could not be removed when a part of the plaintiffs or defendants are citizens of the state where the suit is brought, and a part of some other state: *Wilson v. Blodget*, 4 McLean, 363; *The Northern Indiana*, 3 Blatchf. 82; and in order to remove such cause to the United States court, all the defendants must join in the petition for such removal: See *Smith v. Rines*, 2 Sum. 339.

The motion to remove in December, 1866, was also properly overruled.

The provision of the act of Congress of July, 1866, upon which the petitioner then relied, provided for a removal, in cases of citizenship of different states, on the petition of a defendant, "if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties to the cause." That this was not such a case is perfectly manifest from the slightest inspection of the pleadings and proceedings. Congress passed an act March 2, 1867, providing that where there was a controversy between citizens of different states, either party, plaintiff or defendant, might, on filing an affidavit in the state court that he has reason to and does believe that from prejudice or local influence he will not obtain justice in such state court, file his petition for such removal, and it was made the duty of the state court then to proceed no further in the cause, but the cause should be removed.

This affidavit was made by Coleman and others, and also

an affidavit that orders of the military authorities were involved, in May, 1868. As to the validity of military orders being involved, it is perfectly manifest from all the pleadings, and from the answers of these parties, filed at the same time, that there is not the slightest foundation for removing the cause on that ground. No such questions are raised in any form whatever. This last-mentioned act of Congress, standing alone, might be regarded as sufficiently comprehensive to include this application. But a little consideration, I think, must show us that it was not intended by this to change the practice of the courts, and to override the decision of such courts, which had been repeatedly and uniformly made since the judiciary act of 1789, or to change the law of 1866, providing for such removal in a case where there could be a final determination of the controversy, so far as it concerned the applicant, without the presence of the other defendants. The act of 1866 is not repealed, nor are the provisions of this act at all repugnant to it.

The act of 1867 merely extends the privilege of removal to the plaintiff, as well as to the defendant, on making the required affidavit.

In *Fox v. Commonwealth*, 16 Gratt. 1, Judge Moncure says, in delivering the opinion of the court: "The law does not favor a repeal by implication, unless the repugnance be quite plain, and then only to the extent of such repugnance." Again he says: "It is therefore an established rule of law that all acts *in pari materia* are to be taken together as if they were one law; and they are directed to be compared in the construction of statutes because they are considered as framed upon one system, and having one object in view. And the rule equally applies, though some of the statutes may have expired, or are not referred to in the others."

The provision of the act of 1866, limiting the application to a case where the party can have the suit determined, so far as it concerns him, without the presence of the other parties on the same side, is an eminently wise and just one.

It would be manifestly unjust that one defendant out of a large number should have the right to take a case from a court where all of the other parties wish it to be without very strong and peculiar reasons. It is very easy to see how this might often work infinite mischief and confusion; and few cases can be found which would better illustrate this than this case.

This has been seen and acted upon by all courts without

exception, and also by Congress, certainly up to the passage of this act; and with this view, and looking at the great mischief that otherwise would ensue, I cannot believe, without explicit words to that effect, that it was intended to repeal the act of 1866; and therefore both must be taken together in construing the real intention of Congress. I do not at all call in question the constitutionality of these acts; but construe them all together, as I think we are bound to do: See Am. Law Reg., January, 1870.

There are other reasons why, in this particular case, the removal should not have been made.

The substantial parties in this controversy are the old company on the one side, and the new one on the other.

These are both certainly citizens of Virginia. The individuals named derive all their rights in this cause through one or the other of these companies. As individuals, they are citizens of different states; but as members of the several companies, they are not: *La Fayette Ins. Co. v. French*, 18 How. 404. These petitioners come in simply as stockholders in the new company; and while they allege that there can be a final determination of the controversy, so far as it concerns them, without the presence of the other defendants, parties in the cause, the petition itself, as well as their answers, show that this cannot be true. The new company, of which they were stockholders, was in court defending the case, and in such case they could not, as individuals, control the cause: See Angell and Ames on Corporations, sec. 407, and cases there cited. The power of stockholders to bring proceedings against the company for violation of the duty of such company is not denied; but I do not think that this was the way to come into court on such grounds. They had the power, holding, as they claim, the majority of the stock, to remove their officers and directors if they were acting improperly, and put in their place those who would do their duty: Code of 1860, c. 57, secs. 8, 12.

These parties were allowed, at the discretion of the court, to be made defendants upon their petition representing that they had interests which would be affected. But at the same time a decree was made adjudicating the principles of the cause. True, they complained of this, but their answers did not set forth any new facts which could throw any additional light upon the principles of such adjudication; and having just come in as defendants with others, under such circumstances,

why should the decision of this question be delayed? The court says: "With a view to the speedy determination of the cause, it is deemed proper to make this adjudication." Nor do I see that this case is one in which the parties who have not united in this last application for removal are mere formal or nominal parties, or parties without interest, in which cases the real and substantial parties have been held to have the right to remove the cause to the United States court: See *Wood v. Davis*, 18 How. 467.

The action of the court below in making the decree adjudging the principles of the cause, at the November term, 1867, has been so severely commented upon that it seems proper to examine this action a little more critically.

The defendants, Coleman and others, then made a simple petition as stockholders of the new company, asserting that it was a legal corporation, and asking to be made parties, as they were interested in the decision of the case. They allege, it is true, they can successfully defeat the claims of the old company, and establish the validity of the new company. Their petition is not sworn to, nor any new facts alleged.

The court, deeming their petition reasonable, allowed them to be made parties, and required the complainants to amend their bill so as to make them parties. It is evident, however, that the court did not intend to allow them to be made more than formal parties, and for the purpose only of establishing such equities as they might be able to show; for it seemed manifest that if the new company were adjudged void, still they, as individuals, had equitable claims upon the road. From the very position they occupied and placed themselves in, they could do nothing more than this in either event. If the new company were adjudged a valid one, then this new company being properly in court, they, as mere stockholders of that company, as such, had no standing in court. But if, on the other hand, the new company should be adjudged invalid, as it was, they then had nothing but equitable interests, which could be preserved in no other way than as they were provided for in this very decree.

I do not see, therefore, how their rights were prejudiced. In fact, I do not see how the cause could properly proceed as to them until their precise position should be ascertained and adjudged; for, as I have before said, if they were stockholders of a valid corporation, they had no standing in court; if individuals only, they had merely equitable interests, and could

not then contest the validity of the old company. The same decree that admitted them as defendants adjudged the validity of the old company. The purpose of admitting them as defendants was thus manifestly only to allow them to establish such equitable interests as they might be able to establish; and the bill was required to be amended only for that purpose, and they were allowed to file their answers only for that purpose. They complain that they were not allowed to take testimony, and that they had not then filed their answers. But they have since, and before the final decree, filed their answers, and the right to take testimony for the purpose for which it was alone proper that they should take testimony has not been denied, but, on the contrary, is expressly provided for in the decree from which the appeal was taken.

It may be remarked that the answers filed by them do not set forth any facts additional to those which were before the court which could have affected the decision of the question which was then adjudicated. While, then, there seems to be an apparent inconsistency in allowing them to be made parties, and making the decree which was made before the filing of their answers and the production of their testimony, a critical examination of the situation of the parties, and the real substance of the decree, and the intention of the court, shows, I think, that it acted with entire propriety.

The petition for removal was not made until the next term of the court, after there had been a decree in effect adjudicating the principles of the cause, and which even then might have been regarded as sufficiently final for the purposes of an appeal to an appellate court.

After their case is really decided, and this, too, without objection to the jurisdiction of the court, then they ask to have this cause removed, so that they can try the same question again in another forum.

To allow the removal of the cause under such circumstances would give them the chances of two courts, if the first decided against them, or, in other words, would be substantially allowing an appeal from a state to a United States court.

Under the act of 1867, the application must be made before final hearing. The substantial final hearing had been made, and though the parties call themselves defendants, and put in what they call answers, such answers are substantially nothing but petitions, or in the nature of cross-bills, setting up equitable interests, which they claim should be protected. At

least, they could not be otherwise regarded by the court after the decree which it had made at a previous term, fully adjudicating the principles of the cause.

In view of these considerations, I am very clear that there was no error in denying the motion for removal of the cause to the circuit court of the United States.

There is another view which may be presented, which, if correct, is conclusive, so far as this court is concerned, upon this question. The appeal to this court is not made by these petitioners. It is made by the new company. It was not the new company which presented this last petition for removal. It did not make the motion in the court below. In fact, then, I very much doubt whether this question is properly before us. If there was an error in refusing the petition for removal, it was an error by which the petitioners, not the company, were aggrieved. In this case, it seems to me the petitioners should have taken the appeal, in order to have the error by which they were aggrieved corrected.

I very much doubt whether one defendant can allege as ground of error that a co-defendant is aggrieved by a decision of the court below. The co-defendant should make known his complaint for himself. For all that the record shows, these petitioners may now acquiesce in the decision of the court below. This view may be applicable also to some of the other grievances which it is claimed these petitioners have suffered by the final decree of the court below.

The conclusion we have come to necessarily brings us to the consideration of the next question, — the validity of the sale.

The deed of trust, upon which the sale was founded, contains this provision: "And it is mutually agreed that in case of the death, incapacity, or resignation of the party of the second part, or of his successors in this trust, then the office of trustee filled by him shall become vacant, and such vacancy shall be filled by an appointment to be made by any court of record in the county of Alexandria, on the application of the parties of the first part, or of the holders of three fifths of said bonds. Provided, however, in the last case, notice of the application of the parties making such request be given to the president or one of the directors of said company; and all the rights, power, and authority hereby conferred on the original trustee shall then and there devolve upon and be invested in his successor or successors so appointed."

It also provides that, in case at any time six months' in-

terest becomes due and unpaid, the trustee "shall, upon the request in writing of the holders of at least three fifths interest of said bonds," cause the property to be sold at public auction, after giving at least sixty days' notice of the sale by publication in certain newspapers therein named, and shall have authority thereupon to convey the said property to the purchaser.

This is a contract, the authority to make which is not disputed; and upon this depends the authority of proceedings in relation to the sale, but of course is to be construed with reference to the laws of the state then in force. The manner of serving this notice must then be supposed to be according to the law relating to such service. This notice is agreed to be the process upon which the jurisdiction of a court of record to appoint a trustee depends.

But we are met at the threshold of this inquiry into the validity of the order of the court by the proposition that, as the court was one of general jurisdiction, its judgment cannot be assailed only upon the ground of want of jurisdiction, and the presumption is, that all the steps necessary to give it jurisdiction were taken by the court. It should be borne in mind that this is not a proceeding in which this judgment is collaterally assailed, but is a bill in equity, filed for the specific purpose of setting aside this judgment and attacking it directly. The bill sets out facts for the very purpose of showing that the court did not have jurisdiction. Although the distinctions made in different cases, as to when the record of a court may or may not be contradicted, are very subtle, and somewhat difficult to reconcile, I do not think that any case can be found in which it is held that such record may not be assailed in a direct proceeding for that purpose in equity by showing fraud, or especially by showing that the court did not in fact have jurisdiction.

However this may be, I am sure that the defendant may be allowed to show that he had no notice, and that there was no process bringing him into court, by filing a bill in equity for this specific purpose, and by actually showing such want of jurisdiction. Any other construction of law would be the most apparent injustice, for there could be no other remedy. An appeal would not correct it, for on an appeal the party would be bound by the record as it is. A judgment of a court beyond its jurisdiction is plainly void; and to render a judgment *in personam*, it must have jurisdiction of the person. If

it be a judgment *in rem*, it must have jurisdiction of the thing. Every lawyer knows, for example, that a judgment in a case of attachment, if there is not also a service upon the person, is only a judgment against the property. Such a judgment does not authorize a levy of an execution upon other property, nor is it even evidence of a judgment against the person. This is not a proceeding *in rem*. In such cases, courts acquire jurisdiction only by seizure of the thing, and even then, in most, if not all cases, notice is given in some way to parties interested, by publication or otherwise, and especially if it is agreed that jurisdiction shall attach only by giving a notice: See *Penobscot R. R. Co. v. Weeks*, 52 Me. 456; *Hollingsworth v. Barbour*, 4 Pet. 466; *Harris v. Hardeman*, 14 How. 334; *Webster v. Reid*, 11 Id. 437.

In *Harris v. Hardeman*, *supra*, the court says: "In all judgments by default, whatever may affect their competency or regularity,—every proceeding, indeed, from the writ and indorsements thereon, down to the judgment itself, inclusive,—is part of the record, and open to examination.

Applying this principle to the present case, on the examination of the affidavit of Joseph Davison, we find that the record itself shows that there was no notice. This would make it void upon its face. I can see no escape from this conclusion, and I do not see how it can be seriously questioned. In the case of *Vorhees v. Bank of United States*, 10 Pet. 449, the court say: "There is no principle of law better settled than that every proceeding of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears." This is a case strongly relied on by the appellants, and is perhaps one of the strongest cases on record upholding the validity of judgments of a court. But this was a case in ejectment, and a judgment of a court showing a sale by attachment was put in as defense; and in such a case the court say, though the record does not show the proper steps to have been taken, or even that the steps necessary to give jurisdiction were taken, it must be presumed that they were taken, and the facts could not be controverted in this collateral manner.

The cases of *Harvey v. Tyler*, 2 Wall. 328, *Florentine v. Barton*, 2 Id. 210, and *Comstock v. Crawford*, 3 Id. 304, so strongly relied upon by the appellants, were all actions of ejectment, and the records were all sought to be set aside by showing facts *aliunde*; and the court held that this could not be done. The case of *Devaughn v. Devaughn*, 19 Gratt. 556,

decided by us at the present term, was a decision upon an appeal from a judgment of the county court, in which it was claimed that the record did not show affirmatively that it had jurisdiction; and we held only that it was to be presumed that the steps necessary to give jurisdiction were taken, and that the presumption must be that the court had evidence sufficient to justify the order which was made.

But it is easy to see the difference between these cases and the one under consideration. Besides, in these cases, the records did not disclose the want of jurisdiction on their face.

But it is urged by the appellants that they had a sufficient excuse for not giving a notice, from the fact that the persons entitled to such notice had all left the country, had gone beyond the federal lines into the lines of a public enemy; that they had abandoned the property, and were traitors to the United States government, and engaged in war upon that government, and that it was impossible to give them notice; and the law does not require impossibilities. This presents a strong appeal to all those who were loyally disposed to the United States, especially when presented, as it is in the answer, in the fiercest language and in the most glowing terms. Still, we must not be misled by such an appeal, and must subject it to the test of legal principles. These facts were certainly not shown to the county court. Nothing of them appears in the affidavits upon which the order was founded. If they could be regarded as an excuse for not bringing the person within the jurisdiction of the court, such excuse was certainly not made the basis of such jurisdiction, and it seems to me rather late to offer such excuse before another court to bolster up a jurisdiction which otherwise would fail. But suppose all this were true, and then shown to the court, it cannot really be seriously contended that if the parties were the greatest criminals on earth, if they had left their property without any one to attend to it, that therefore they can be deprived of their rights or their property, except by the law of the land, or, in the language of the constitution, "by due process of law." Certainly this does not give to individual citizens the right to deprive them of such rights or property. Nor can I see how it matters whether such property were valuable or nearly worthless, or whether it had been properly or improperly managed.

But was it a sufficient excuse for not serving a notice that the persons entitled to such notice could not be found? When

a condition precedent becomes impossible of performance, a person may be excused from performing it; but it does not therefore always follow that because it is impossible the right or privilege depending upon such condition precedent can be maintained, not even if this is made so by the acts of the other party entitled to such condition precedent.

Where a court has no jurisdiction of a person, it does not follow that because a party has done all that he could do to bring such person within such jurisdiction, and has failed, that therefore the court can proceed without obtaining jurisdiction. I cannot say, however, that in this case this impossibility was caused by the act of the party entirely. He went South, it is true, voluntarily, but he went expecting to return soon; but he could not return. This was a misfortune for him; and it was also a misfortune, perhaps, for those whose rights were affected by his not being able to return. But it was a misfortune which resulted for the most part, at least, from the war in which the nation was unfortunately engaged, and by reason of which thousands of others, in common with the parties to this cause, unavoidably suffered, and for which courts and the usual legal proceedings could not afford an adequate remedy.

But it does not seem to me that the parties asking for the appointment of a trustee did, in fact, all that they might have done. The president of the old company still had a residence in Alexandria.

The deposition of E. S. Boynton, a witness for defendant, shows that he had a residence with his family until April, 1861, and he himself resided there until May, leaving his house and furniture in charge of said Boynton, and declaring that he expected to return in sixty or ninety days. We can readily infer, from the facts of history within judicial cognizance, why he could not have returned if he had wished. I cannot discover from the records how there is any proper evidence of his having engaged in arms against the government, for the answer stating such fact could not have been given upon any knowledge by the affiant, and this is not to be presumed; nor is there any sufficient evidence showing that he did not, at all times, intend to return to his place of residence. In fact, the affidavit of Davison, upon which the order of the court was made, does not state that he had no residence in Alexandria, and is defective on that ground. This, at least, should be shown positively in any aspect of the case.

I cannot see what excuse can be rendered for not serving the notice by leaving a copy at his residence as the statute prescribes.

Besides all this, the deed of trust itself shows that Lenox, who was an officer and director of the company, and the trustee in the deed of trust, was a non-resident. Notice to him could certainly be given by publication in accordance with the statute. Why could not this have been done?

It was said that he received notice as trustee. But this would not prevent notice to him as director. What excuse can be offered for not notifying him by publication? This would have brought them within the provisions of the deed of trust.

If the facts as alleged in the answer were all true, and it appeared that the road and all the property were abandoned, and it was absolutely impossible to give any notice to anybody, and in the mean time creditors had no other means of saving their rights, while such a state of facts might be urged with great force for a court of equity to assert jurisdiction for the protection of all parties interested, upon all these facts being brought before such court, I think it very clear that a single creditor, without regard to the rights of others,—without showing the court this state of facts,—cannot, upon a single affidavit or petition, ask a court to make an order to protect his rights, and without really taking into its own hands the property itself for the benefit of all parties, owners as well as creditors.

Cases have been produced to us to show that a corporation, by abandonment and non-user of its franchises, forfeits those franchises. Suppose this to be so; I cannot see how it would help these appellants. To whom would such franchise be forfeited? Evidently to the sovereignty from which they emanated. This would not allow individuals to seize upon them. They could not take advantage of such forfeiture. The new company could not derive its existence from such a source.

It is objected that the application for the order was not made by a person authorized to do so by the holders of three fifths of the bonds. I very much doubt whether the evidence fully establishes that any other than the person named, Benjamin Thornton, was the holder at the precise time.

It is very evident that Charles M. Wilkes was the holder, and entitled to hold within a very few days thereafter and

some time before the sale, whether he was the owner or not, and entitled, as such holder, to determine whether he would allow them to be converted into cash or to remain on interest at seven per cent, or whether they should become extinguished in his hands by the conversion of the security into cash to go into the hands of a trustee not required to give security, and with whose appointment he has had nothing to do, and whom he might not be able to compel to pay to him the money to which he was entitled.

Suppose, however, that we are wrong in coming to the conclusion that this order appointing the trustee should be set aside, the admitted facts of this case show very plainly, I think, that the sale should be set aside on the ground of facts occurring after such order. Suppose that Stewart were the proper trustee, invested with all the power of the original trustee. He has simply a naked power to sell. His authority is based only upon the deed of trust, and he must pursue the provisions of the deed strictly. He must be able to justify his act, not by any presumption or inference, but positively and necessarily. The divesting of the franchises and property of a railroad company is not to be permitted upon a doubtfully exercised power of a mere naked trustee.

The first step taken is, to say the least of it, a very doubtful one. Sale can be made only on the request, in writing, of the holders of at least three fifths of the bonds. Now, the request in writing was, as specified by Davison, as agent and attorney in fact of the owners of more than three fifths of the bonds. This is liable to two objections: 1. There was no writing then produced from even the owners of the bonds. There was a writing from Davison, but this was not founded upon a writing from the owner. There is not to this day written evidence that the owner then, at that time, had ever authorized this demand. 2. Even if Davison was the agent of the owners, this does not necessarily imply that he was the agent of the holder. An owner may, and often does, divest himself for a time of the possession and right to hold his property; and for all that appears in this written notice, this may have been done.

More than this: the reasonable probability from the evidence is, that this was actually done at the time of giving this notice. While this fact may not appear to be sufficiently established to set aside an order of court, it does appear suffi-

ciently to throw great doubt upon the power of the trustee to proceed to the sale.

Certainly, at the time of the sale, Thornton was not in a position to deliver up the bonds or to require the delivery.

But let us look further at the subsequent conduct of this trustee, and the circumstances of the sale.

A trustee is the agent of both parties. He is especially of the party constituting him such trustee. His duty is to be perfectly fair in all his conduct, and especially to see that the interests of the party who has conferred upon him this power are protected to the fullest extent. His action has, therefore, been held to be especially the subject of inquiry by a court of equity: *Gibson v. Jones*, 5 Leigh, 370; and as such, it is his duty to do all that can reasonably be done to effect the most advantageous sale possible.

It has therefore been the common practice of our courts to require that in all such sales, if there are prior liens, either contested or doubtful or not precisely ascertained, such liens shall be ascertained so that they may be made known to the purchaser: *Cole v. McRae*, 6 Rand. 644; *Rossett v. Fisher*, 11 Gratt. 492; *Jaeger v. Bossieux*, 15 Id. 83, 103 [76 Am. Dec. 189]. Otherwise, how is it possible that there could be anything like a fair sale of the property? Now, what were the facts in this case? The affairs of the road were confessedly, and in fact charged to be by the defendants themselves, in a most complicated condition. There were numerous judgments and two deeds of trust. Most of the judgments, it is true, were in fact subsequent to the deed of trust. But the fact should have been well ascertained as to which were prior and which were subsequent. There were a large number of liabilities of the company, and as the defendants themselves allege, persons owning these liabilities were making them known even at the sale. The question of the validity of the two prior deeds of trust was openly made at the sale. The trustee of the deed of trust for sixty thousand dollars was present at the sale, asserting its validity, while Stewart says in his deposition: "I at the same time saw fit openly to dispute the validity of both the deeds of trust of the corporation of Washington, and Fowle, Snowden, & Co., as valid liens upon the road"; and the record shows that there is at this time a contest in the courts concerning the validity of this first deed of trust.

Now, under such circumstances, was it possible that there could be anything like a reasonable sale? How could a pur-

chaser have any knowledge of what he was buying? The code provides (chapter 61, section 29) that when a purchase is made of the works and property of a corporation, the purchaser shall not be entitled to the debts due to the first company, nor be liable for any debts of or claims against the company "which may not be expressly assumed in the contract of purchase."

The defendants contend that by this sale a new company was formed. If this be so, ought not the contract of purchase to show whether the debts and liabilities of the old company were assumed? Ought there not to have been at the sale an understanding whether it was sold subject to the debts and liabilities of the old company or not? If not, then the purchaser should know it, for it would make a material difference in his bid. Certainly, this ought not to be left to the mere will of the purchaser after he has made his bid. The matter ought to have been clearly and plainly understood at the sale, and I think it would have been proper, if not necessary, that the advertisement of the sale should have stated how the sale would be made. It should at least have been made known generally, as well as to the purchaser, Hay, whether the sale was subject to the debts and liabilities of the old company or not.

Again, the record discloses that Stewart, who all the time professed to act in the capacity of attorney for the purchaser, Hay, had already in his hands more than sufficient money, the property of the company, to pay all that was then due upon the bonds. This fact Hay must be presumed to have known, and to have purchased with this knowledge. That the interest of the seller was not properly attended to is further seen by the fact that the United States government had possession of the road during all this time, and it was a well-known fact that possession could not then be delivered; and no one could tell when it would be, or what claims the government would have upon it when so delivered. It was impossible that, under such circumstances, a sale could be made otherwise than at a ruinous sacrifice. The position of Stewart was, to say the least of it, a peculiar one. He was, if properly appointed, the trustee to make the sale, and as such in duty bound to effect the best possible sale, and the attorney at law and in fact of Hay, the purchaser, and as such interested to procure the sale on the lowest possible terms. More than this, he had made an agreement in writing with Davison, in which he stipulates what he will do, "on behalf of himself and constituents," in case the road be purchased by himself or constituents; show-

ing that he was then contemplating a purchase by himself, as well as by his principal and client. Can he be said to have been perfectly impartial and disinterested?

Is it possible that a trustee for sale can at the same time be attorney at law and in fact for the purchaser, and acting in his interests?

Stewart, in fact, did immediately become interested in the purchase.

He had also previously been appointed, by writing, the attorney for Davison, the agent of the bond-holders, and as such was to receive from him a large contingent fee in case of a sale of the road; he to use all diligence in the closing out and perfecting the interest of said bond-holders in and to said road. (What interest had the bond-holders in the road, except to receive the money which might be realized from the sale?)

On this writing there was indorsed by Joseph Thornton, May 3, 1862: "There will go to Mr. Stewart thirty-five thousand dollars of stock out of the one hundred and forty-two thousand dollars set over to me, his thirty-five thousand dollars being subject to a *pro rata* deduction in making up the fifty thousand dollars, or whatever may be used of that amount, which is set apart." This fifty thousand dollars, it otherwise appears, was to be set apart for procuring a charter from Congress. It is true that Stewart testifies that no agreement was effected with Davison and Thornton before the sale. But these papers appear to have been executed; and he himself testifies that the probabilities and feasibilities of forming a new company were much discussed, and, as he says, "in the event that either Thornton or Davison became the purchaser, the question of who would take an interest, and how, was much figured over as a thing entirely prospective, and it was agreed, if I saw fit to do so, I could be one of the parties forming the new company."

These facts show, I think, that Stewart was at least so far interested in the purchase as to render it impossible for him to act as trustee with that propriety which a court of equity requires.

It further appears that no money was ever paid to the holder of the bonds from the proceeds of the sale, but they were still, by the permission of said trustee, and at the request of Joseph Thornton, allowed to remain in the bank of Riggs & Co., at Washington, as the basis of a loan to Benjamin Thornton from one Wilkes, of something over two thousand pounds,

and a portion of the proceeds were used in reorganizing the new company. A company was immediately organized, of which Stewart was the secretary and a large stockholder, and stock was issued to the amount of three hundred thousand dollars.

This fact tends strongly to show that the object of the sale was not so much to satisfy the amount due upon the bonds, and in accordance with the real wish of the holder of the bonds, as it was to get the title of the old company into the hands of these parties, who were devising a plan by means of which they could form a new company, and which had been much "figured over" by all these parties, including the trustee.

By special act of assembly, this new company was soon after authorized to issue stock to the amount of five hundred thousand dollars, besides bonds to the amount of two hundred thousand dollars, and notes to the amount of one hundred thousand dollars.

Stock has been issued to a large amount in excess of the amount authorized, as the decree states, and bonds, etc., have also been issued, and out of this, money has been raised and in part expended for the benefit of the road; so that it will be seen that other parties have equities in the road which should be provided for.

This history of the transactions connected with the sale must show, I think, that even if the order appointing Stewart was perfectly valid, yet the sale was conducted in such a manner, and shows such a state of actual fraud, that it cannot be sustained by a court of equity.

It is urged upon us with great earnestness and force, that even if such order were void, and the sale was an illegal and fraudulent one, yet that the company, taking no steps for a period of four years, and allowing the stockholders of the new company to invest large sums of money on the faith of the validity of such sale, without being cognizant of such fraud, the old company should be considered as having acquiesced in such sale, and should now be estopped from contesting such validity as against them.

There are cases which show that acquiescence in sales made by order of a court of competent jurisdiction for a long period shall be regarded as a waiver of the right to contest the validity of such sales. In extreme cases, where there has been long acquiescence, sales made by order of the court have been sus-

tained, on the ground that judicial sales ought to receive the highest possible sanction, and should be regarded as giving the utmost possible protection to the purchaser.

But, in the first place, the acquiescence which is shown in this case is not of such a character as I think should be regarded as an estoppel.

The parties who alone could object for the old company were in such a situation that, so far as they were concerned, it was for nearly the whole period a forced acquiescence. True, they had gone into the lines of public enemies against the United States, and had gone voluntarily; but whatever may be said of the wrongful nature of said acts, yet they were in such a situation that it cannot be said that, during this period, they voluntarily acquiesced in the disposition of their property. Besides, up to August, 1865, the government was in actual and exclusive possession and control of all this property; and while it was so, I do not think any party could be justified in claiming to act in entire ignorance of all claims that might be brought against it. I cannot give any countenance to the claim that the government held, as a tenant of Hay under a contract by him, as a mere creditor and with no claim upon the road, except such as might have been satisfied by the payment of five thousand dollars.

Again, so far as the sale was concerned, it was not a judicial one. The court had nothing whatever to do with the sale. The court simply substituted one trustee in the place of another. The court did not direct the sale. The sale was not professed to have been made by any other authority than that of a trustee, with no power to guarantee the title, who did not profess to guarantee the title, and the purchaser was bound to make inquiry and to fully investigate the sources of his authority; and if he neglected to do so, it was his own negligence. And such a sale is not at all like one where a purchaser has an order of a court of competent jurisdiction, and which he is authorized to presume to be correct.

Again, a corporation cannot be created by mere acquiescence. This can be done only by positive act of legislation, or by some power authorized by some legislative act.

Still, under the circumstances of this case, the new company ought to have reimbursed to it the money which it has actually expended for the benefit of the road, which ought to go to its stockholders.

A very large portion of the money invested by the stock-

holders seems to have been upon representations for which the old company could be in no wise responsible, and it certainly could not be regarded as having acquiesced in them. Much of it has been upon false and spurious certificates of stock, issued by the new company; but the remedy of those who have thus been deceived is upon those whom they have trusted. Their case is an extremely hard one, and appeals strongly to our sympathies, and so far as they can be lawfully protected they should be.

They claim that a very large amount (several hundred thousand dollars) has been expended for the benefit of the road, and provision should be made for the repayment of so much of this as they can establish; and this can be done under the decree as it now stands, and such further orders as may be made by the court upon a consideration of the evidence which may be produced.

The new company procured a special act to be passed by the Alexandria legislature, February 5, 1863, declaring this sale to be a valid one.

This act was in plain violation of the constitution, and therefore void.

It was an assumption of judicial power by the legislature.

Article 2, constitution of Virginia, declared, "the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall execute the powers properly belonging to either of the others.

Article 4, section 35, provides that the general assembly shall not, by special legislation, grant relief in a case of which the courts or other tribunals may have jurisdiction.

Besides, it attempts to divest antecedently vested rights, and also to impair the obligation of the contracts between the parties: See *Taylor v. Stearns*, 18 Gratt. 244, 274.

I can see no necessity for giving a construction to the statute relating to the sale of the works and property of a corporation, and the powers and privileges of the purchaser at such sale: Sections 28 and 29, chapter 61, of code of 1860. This is a matter rather for the new company and those connected therewith to settle among themselves, and suits are now pending, as I am informed, to determine the questions between them.

The decree of the court below very properly provides for an investigation into the equitable interests of the several parties to this controversy, and for security for their protection, and I see no reason why it should not be fully affirmed.

DORMAN, J. Concurring in the result reached in the above opinion, it seems proper to say that the concurrence is much more readily yielded from the views entertained on another point presented by the record, which was elaborately argued by the counsel on both sides, but not considered in the opinion of Judge Willoughby. It has been impossible to arrive at the conclusion that, in sections 28 and 29, chapter 61, of the code of 1860, it was the intention of the legislature that a sale by a trustee of a mere equity, conveying no legal title, was such a sale and conveyance of the property and rights of the old company as to "pass to the purchaser at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may after that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it"; and also *ipso facto* to dissolve the company, and at the same time to constitute the purchaser forthwith a corporation, succeeding to all the privileges and franchises of the original company. The comprehensive terms of the law seem to preclude the supposition that anything short of the sale and transfer of the legal title, together with the property, privileges, and franchises, can merge the old company in a new corporation under the statute.

BURNHAM, P., dissented.

Decree affirmed.

CITIZENSHIP OF CORPORATION AS IT RESPECTS JURISDICTION IN SUITS BY OR AGAINST: See *Hobbs v. Insurance Co.*, 96 Am. Dec. 472; *Phoenix Ins. Co. v. Commonwealth*, 96 Id. 331; *Ducat v. Chicago*, 95 Id. 529.

CORPORATIONS ARE ENTITLED TO CHANGE OF VENUE equally with individuals: *Commercial Ins. Co. v. Mehlman*, 95 Am. Dec. 543, and note 551.

CONSOLIDATION OF TWO CORPORATIONS INTO ONE, EFFECT OF: *Indianapolis etc. R. R. Co. v. Jones*, 95 Am. Dec. 654; *McMahan v. Morrison*, 79 Id. 420, note.

POWER TO CREATE CORPORATION IS ATTRIBUTE OF SOVEREIGNTY: *State v. Curtis*, 95 Am. Dec. 263.

EVERY PRESUMPTION IS MADE IN FAVOR OF JURISDICTION OF SUPERIOR COURTS: *Withers v. Patterson*, 86 Am. Dec. 643; *Callen v. Edison*, 82 Id. 448.

PRESUMPTION IN FAVOR OF JURISDICTION OVER PERSON, EVEN OF COURT OF GENERAL JURISDICTION, MAY BE REBUTTED in all collateral proceedings: *Clark v. Thompson*, 95 Am. Dec. 457.

PARTY CANNOT LEGALLY PURCHASE FOR HIMSELF THAT WHICH HIS DUTY REQUIRES HIM TO SELL FOR ANOTHER, nor purchase for another that which he sells as his own: *Remick v. Butterfield*, 64 Am. Dec. 316.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

TOMPKINS v. VINTROUX.

[8 WEST VIRGINIA, 148.]

CALL FOR BOUNDARY IN DEED OF PARTITION WAS "from the base of the hill to the back line of the survey, such course as will throw five hundred acres of said tract of one thousand acres below said division line": *held*, that as natural objects and fixed lines control magnetic calls and distances, the call for the "back line" would control the case for quantity, and that the line from the given point to the "back line" must be a straight one.

ACTION OF TRESPASS QUARE CLAUSUM FREGIT CANNOT BE REVIVED in the name of the personal representative of one of the joint plaintiffs, who died pending the action and before verdict. But such revival, if by consent, in the name of the sole devisee of the decedent, cannot afterwards be objected to by either of the parties consenting.

TRESPASS *quare clausum fregit*. The material facts appear in the opinion. The jury found for the plaintiff, and the defendant's motion to set aside the verdict and for a new trial was refused by the court. The defendant brought his writ of error.

B. H. Smith, for the plaintiff in error.

G. H. Lee, for the defendants in error.

By Court, BROWN, President. The point requiring the determination of the court in this case is the proper construction to be put upon the partition deed of John and Samuel Lewis, in which they, claiming to be the joint owners of a thousand-acre tract of land on the south side of Kanawha River, including the mouth of Scary Creek, divide the same as follows: "Beginning on the Kanawha River, three poles above the

mouth of Scary Creek; thence across the bottom to the base of the hill, three poles above the creek, so as to make the line from the river to the hill extend three poles above the creek; thence from the base of the hill to the back line of the survey, such course as will throw five hundred acres of said tract of one thousand acres below said division line; and the said John is to have all lying above said line, and the said Samuel all lying below it."

It will be observed that the point on the Kanawha River, three poles above the mouth of Scary Creek, is definite and certain. So also is the line thence across the bottom to the base of the hill, three poles above the creek. At the end of this line, at the base of the hill, begins the line of controversy, and, for brevity, I will call this point the pivot point, and the succeeding line, which is the line of controversy, the random line. From the pivot point to the back line of the survey the random line is to be run. Such is the descriptive call of the deed, but with these further provisions, that the said random line is to extend from the pivot point to the back line of the survey, "such course as will throw five hundred acres of said tract of one thousand acres below said division line."

The report of the surveyor and evidence show that the back line of the survey was 508 poles long. So that the first part of the call of the random line from the pivot point to the back line of the survey is fully satisfied if it strike the back line at any point between its two extremities. This random line, therefore, may vary at one end a distance of 508 poles, and still meet the express call for the back line, as well at one end or the other, or in the middle of it. And as the random line is to include in the part of the survey below that line the quantity of five hundred acres, much latitude is allowed to vary the line on the pivot point to the whole extent of the back line of 508 poles in length, in order to include, if necessary, the five hundred acres on the lower side of it. If the random line had been extended from the pivot point to the lower back corner of the survey, and it had then been found to include more than five hundred acres on the lower side, could John Lewis, who was to have the upper part or excess over five hundred acres, have been heard to claim the right to depart from the call for the back line, and vary the random line farther down, till striking the lower end of the line of the survey the quantity of five hundred acres only should be contained on the lower side? Certainly not. So, also, varying

the random line on the pivot point from the lower or any intermediate point to the upper corner on the back line, it is found upon experiment that there is not the required quantity of five hundred acres below the division line; but notwithstanding that fact, it would be equally improper in this case, as in the former, to depart from the call for the back line for the sake of quantity. The two calls, viz., for the back line and for the quantity of five hundred acres, being found inconsistent and impossible to satisfy both in a court of law, one or the other must control; and as natural objects and fixed lines control magnetic calls and distances, it would seem that the call for the back line should control the call for quantity; and indeed, the learned counsel who argued the cause for the defendants in error, in effect conceded this point, as he admitted the random line could not be varied or extended higher up for quantity than the upper back corner, and argued, therefore, that inasmuch as a straight line from the pivot point to the upper back corner would not include the quantity of five hundred acres, it was competent to make two lines and an angle between those points, so as to include the required quantity, as had been done in the case. This view of the case raised another point for determination, and that is, whether the call for the course or line from the pivot point to the back line is to be regarded a straight line, or whether it may be varied in direction and number as the party making the survey may choose till the required quantity is obtained. This latter construction would admit of almost endless variety in the location. And as each party to the partition line would have equal right of choice in the variation, it could only result in conflict and confusion, as in this case.

I think there can be no satisfactory reason given for departing from the straight line between the two points ascertained; and if the quantity called for be found not to be embraced by the straight line, the party can only obtain relief in a court of equity, on a proper case made, but in a court of law must be confined within the bounds of his partition deed, as above construed. As it appears from the evidence that the trespass alleged was done on the land in question above the random line if run straight, though below it if run crooked, to include the quantity, in which former case the defendant in error had no legal right to or possession of the land above the straight line, it is clear that the judgment should be reversed, with costs to the plaintiff in error, the verdict set aside, and the cause remanded to the circuit court of Kanawha, with instruc-

tions to grant the plaintiff in error a new trial upon the payment of the costs occasioned thereby.

The objection that this case, which is trespass *quare clausum fregit*, could not be revived in the name of the personal representative of one of the joint plaintiffs, who died pending the action and before verdict, I think is well taken, because the action survived to the other joint plaintiff, and whether it so survived or not, in neither case could it have been revived in the name of the personal representative of the deceased plaintiff. But inasmuch as it was revived by consent in the name of the sole devisee of the decedent, it would seem highly expedient and proper that that which had been done by consent should stand, and not be permitted afterwards to be made the ground of objection by either of the parties consenting.

The remaining judges concurred.

Judgment reversed.

IN FIXING BOUNDARIES, MONUMENTS ARE PREFERRED TO COURSES AND DISTANCES: See *Heaton v. Hodges*, 30 Am. Dec. 737-742, extended note; *George v. Thomas*, 67 Id. 620; *Richardson v. Chickering*, 77 Id. 769; *Martin v. Carlin*, 88 Id. 696, and note 701; *Franklin v. Dorland*, 87 Id. 111.

LOCATION SHOULD BE GOVERNED, — 1. By natural objects; 2. By artificial marks; 3. By course and distance: *Stafford v. King*, 94 Am. Dec. 304.

YOAKUM v. TILDEN.

[3 WEST VIRGINIA, 167.]

PAYMENT OF JUDGMENT OR DECREE TO ATTORNEY OF RECORD WHO OBTAINED IT, before his authority is revoked, and due notice of such revocation given to the defendant, is valid and binding on the plaintiff, so far, at least, as the defendant is concerned.

IT DEVOLVES UPON PLAINTIFF WHO SEEKS TO COMPEL DEFENDANT TO PAY OVER AGAIN MONEY paid to the plaintiff's attorney, upon the judgment or decree obtained by such attorney, to show that the defendant had notice of the revocation of the attorney's authority to receive the money, before it was paid to him.

MOTION to quash a certain writ of *feri facias*. The facts appear in the opinion. The motion to quash was sustained, the plaintiff in error excepted, and the cause came up on a writ of *supersedeas*.

Sprigg and Parker, for the plaintiff in error.

J. J. Jacob and Edmiston, for the defendants in error.

By Court, BERKSHIRE, J. The judgment complained of is founded on a motion to quash a certain writ of *feri facias*, in favor of the plaintiff in error against the defendants in error, which issued from the clerk's office of the circuit court of Hardy County, at the instance of the plaintiff in error. This execution was founded on a decree rendered in said court some ten years previous, in a suit in equity, in which Alfred Yoakum was complainant, and his brother, the said Riley Yoakum, the sheriff of Hardy County, as administrator of their deceased father, and his sureties, were defendants.

It appears from the record that the suit in which this decree was rendered was brought by the said Alfred Yoakum for the purpose of settling the accounts of the administrator, and recovering the amounts respectively coming to him and the said Riley Yoakum as legatees under their father's will. It further appears that William Seymour, then a practicing attorney in said court and a resident of Hardy County, appeared and acted as counsel for both Alfred and Riley Yoakum, and procured decrees for the amounts due to each of them from their father's estate; for the former, the sum of \$2,245.29, with interest and costs; and for the latter, the sum of \$3,904.50, with interest; that for the latter sum a writ of *feri facias* issued from the clerk's office of the said court, dated the 29th of September, 1858, which, on account of its being against the sheriff as such administrator and his sureties, was placed in the hands of the coroner of Hardy County for collection.

It also further appears, from the returns made on said writ and other evidence taken in the cause, that the sum of \$1,317.01 was paid on the execution to the coroner, and the residue to the said Seymour, as attorney for Riley Yoakum. And the coroner made return accordingly, that the amount so received by him, after deducting costs, etc., was in his hands ready to render, and that the residue of the execution had been paid to the said Seymour as the attorney of the plaintiff in error. And it also appears that this execution was duly levied by the coroner before he made the return on it, on the property of the defendants in the execution or of some of them, sufficient or more than sufficient to satisfy the same. It further appears that the plaintiff in error, at the time of and for many years anterior to the institution of said suit, was a non-resident of the state of Virginia, residing in the West, where he has continued to reside ever since, and had not from the time first named until recently been in said county, whither he came for the

purpose, as he alleged, of inquiring into and collecting the money so due from his father's estate. It moreover appears that no part of the money so received by Seymour has ever been paid over to the plaintiff in error, and that the said Seymour departed this life, perhaps in 1860, and it is now suggested (though it does not appear on the record) that his estate is insolvent. From the foregoing, it will be seen that the only question presented for our consideration and judgment is, whether, under the facts disclosed in the record, the payments so made to Seymour by the debtors in this execution were valid, and exonerated them from further liability. It was earnestly insisted in the argument here that they were made without proper authority, and ought not to be sustained; that the defendants, by assuming the responsibility of paying to Seymour without first ascertaining his authority to receive the money, ought to bear the loss, if any, instead of letting it fall on the plaintiff in error. And it was further insisted that the burden of proof to establish the authority of Seymour in the premises, as in the case of an agency, devolved on the defendants, and not on the plaintiffs.

I do not think the authorities sustain these positions. On the contrary, they not only indicate a marked distinction in many respects between the *status* of an ordinary agent and that of a licensed attorney at law, but very clearly establish the doctrine that the payment of a judgment or decree to the attorney of record who obtained it, before his authority is revoked, and due notice of such revocation given to the defendant, is valid and binding on the plaintiff, so far at least as the defendant is concerned: 2 Greenl. Ev., sec. 518, and cases there cited in note; *Hitchcock v. Harrington*, 6 Johns. 295 [5 Am. Dec. 229]; *Wilkinson v. Holloway*, 7 Leigh, 277; *Hudson v. Johnson*, 1 Wash. (Va.) 10; *Branch v. Burnley*, 1 Call, 147.

But if the authorities on this point were less full and conclusive than I think they are, yet, under the peculiar circumstances of this case, considering especially the lapse of time and the death of Seymour, I should still be of opinion that the suggestion merely of the want of authority in said Seymour to collect and receive the money would not of itself be sufficient to fix the liability of the defendants in error (who, it must be admitted, are equally innocent as the plaintiff in error), and that it therefore devolves on the plaintiff in error to disprove such authority before he could compel the defend-

ants to pay the money over again. This he has wholly failed to do, and I think, therefore, that the judgment must be affirmed, with costs and damages.

The other judges concurred.

Judgment affirmed.

AUTHORITY OF ATTORNEY TO RECEIVE PAYMENT OF JUDGMENT OBTAINED BY HIM: See *Clark v. Randall*, 76 Am. Dec. 259, 260, note.

ATTORNEY HAS NO AUTHORITY TO RECEIVE DEPRECIATED PAPER MONEY IN PAYMENT OF JUDGMENT OBTAINED FOR HIS CLIENT: *Chapman v. Cowles*, 91 Am. Dec. 508, and see note 516.

AUTHORITY OF ATTORNEY TO RECEIVE PAYMENT OF DEBT, which he is employed to recover by suit or collect, is well settled, and has been sustained by repeated decisions: *Donahue v. Fackler*, 21 W. Va. 130, citing the principal case. It is also cited to the first point stated in the syllabus, in *Harper v. Harvey*, 4 Id. 541.

SMOOT v. COOK.

[8 WEST VIRGINIA, 172.]

IN ACTION OF TROVER, WHEN NEITHER PARTY HAS TITLE to the property, the defendant may show title in a third person, under whom he does not claim, in order to defeat the plaintiff's action.

POSSESSION OF PERSONAL PROPERTY IS PRIMA FACIE EVIDENCE OF TITLE; and if the defendant in trover had possession after the plaintiff had possession of the same property, such possession is sufficient evidence of title to sustain his defense until the plaintiff should prove title.

THE opinion states the case.

Sperry, for the defendant in error.

By Court, BROWN, President. The only question requiring determination in this case is, whether in an action of trover, where neither the plaintiff nor defendant have title to the property, it is competent for the defendant to show title in a third party, under whom he does not claim. Several cases show that the defendant may show such outstanding title to defeat the plaintiff's action, where the defendant claims under the third person, and of the correctness of that there could not, it would seem, be any question; and no good reason is perceived why the same rule should not apply where the defendant did not claim under such third party; for he has the possession of the property, and that raises a presumption in favor of his ownership, and ought not to be disturbed by one having no title. *Potior est conditio defendentis*.

I think, therefore, that the court erred in giving the instructions asked by the plaintiff, and also in refusing the first instruction asked by the defendant, which was to the effect that possession of personal property was *prima facie* evidence of title, and therefore if the defendant had possession of the horse mentioned after the plaintiff had possession thereof, such possession was sufficient evidence of title to sustain the defense until the plaintiff should prove title.

I think there was no error in the refusal of the court to give the second instruction asked by the defendant, because it in effect declared that the use of a citizen's horse by a rebel soldier in the late war against the United States authorized a Union soldier, at any time during the war, to take said horse wherever he could find him, and if so taken, the title of the citizen was thereby divested.

This is an effort to set up title under the much controverted doctrine of belligerent rights of rebels. But it is not deemed necessary to consider in this case that vexed question, because, whether the doctrine be as contended for on the one side or the other, it cannot, upon the broadest construction, be made to embrace the broad doctrine of this instruction.

On the whole, I think the case should be reversed, with costs, and the cause remanded to the circuit court below, for further proceedings to be had therein, with instructions to set aside the verdict and grant the defendant a new trial, on payment of the costs, if asked by him.

The other judges concurred.

Judgment reversed.

TROVER FOUNDED ON POSSESSION CAN ONLY BE DEFEATED when the true owner is known: *Branch v. Morrison*, 69 Am. Dec. 770; and see cases in note 772.

TROVER, CONVERSION TO SUSTAIN: *Tinker v. Morrill*, 94 Am. Dec. 345, and note 349.

RECOVERY IN TROVER CANNOT BE DEFEATED BY SHOWING TITLE IN THIRD PERSON with whom the defendant has no privity: *Weymouth v. Railway Co.*, 84 Am. Dec. 763, and note 767.

UNDER WHAT CIRCUMSTANCES DEFENDANT IN ACTION OF TROVER MAY DEFEAT RECOVERY BY SHOWING TITLE IN THIRD PERSON. — It is stated as a general rule, well supported by authority, that a defendant in trover cannot set up property in a third person, either in bar or in mitigation of damages, without showing some claim, title, or interest in himself derived from such third person: *Duncan v. Spear*, 11 Wend. 54; *Gerber v. Monie*, 56 Barb. 652; *Marsden v. Cornell*, 62 N. Y. 215; *Stowell v. Otis*, 71 Id. 36; *Skinner v. Pinney*, 19 Fla. 42; *Moore v. Aldrich*, 25 Tex. Supp. 276; *Weymouth v. Chicago*

etc. R. R. Co., 17 Wis. 550; S. C., 84 Am. Dec. 763; *Harker v. Dement*, 9 Gill, 7; S. C., 52 Am. Dec. 670; *Finch v. Blount*, 7 Car. & P. 478. And it is said that although there are cases where it is stated generally that in trover the defendant may show title in a third person, yet that should be understood as assuming that the defendant offers at the same time to connect himself with such title: *Weymouth v. Chicago etc. R. R. Co.*, 17 Wis. 550; S. C., 84 Am. Dec. 763; *Steele v. Schricker*, 55 Wis. 134, 142. On the other hand, it has been distinctly held that the defendant in an action of trover may, generally, defeat the action by showing that the legal title is in a third person, without connecting himself with it: *Marks v. Robinson*, 82 Ala. 69; *Glenn v. Garrison*, 17 N. J. L. 1; and see *Dermott v. Wallach*, 1 Black, 96; *Leake v. Loveday*, 4 Man. & G. 972. And it is the settled doctrine in North Carolina that when the action is for the conversion or appropriation of the goods to the defendant's own use, it is a full defense to show that the goods belong to another person, and that the plaintiff has no interest in them, although no privity be shown to exist between such owner and the defendant: *Boyce v. Williams*, 84 N. C. 275; S. C., 37 Am. Rep. 618; *Barwick v. Barwick*, 11 Ired. 80; *Rose v. Coble*, Phil. L. 517; but see *Barwick v. Wood*, 3 Jones, 306. When, however, the action is by the mortgagee of chattels against a subsequent purchaser from the mortgagor, or one who has succeeded only to his right and title, the defendant cannot set up an outstanding title in a third person, such as an older mortgage, unless he connects himself with it: *Marks v. Robinson*, 82 Ala. 69.

It is said that the cases cited in support of the rule that title in a third person is a defense to the action are usually cases of replevin, and not for conversion; and the rule in replevin has always been different from that in trover, or trespass *de bonis*: *Steele v. Schricker*, 55 Wis. 134, 142. But in replevin in the *cepi*, at common law, the defendant could not, under the plea of the general issue, show title in himself or in a stranger. In order to defend such an action, he was bound to prove either property in himself or in a third person with which he was in some way connected, and under which he could justify, and he was bound specially to allege the facts: *Griffin v. Long Island R. R. Co.*, 101 N. Y. 352. In an action of replevin in the *detinet*, however, the plaintiff sought to take property from the defendant simply detained by him, and he was obliged to show title, or the right to the possession, as against the defendant; and title in a third person, with which neither party was in any way connected, might furnish a defense: *Stowell v. Otis*, 71 Id. 36. The general issue was tendered by the plea of *non detinet*, which put in issue as well the plaintiff's property in the goods as the detention thereof by the defendant: *Griffin v. Long Island R. R. Co.*, 101 Id. 348. So, under the code system of pleading, where an action to recover a chattel is based solely upon a wrongful detention, a general denial puts in issue as well the plaintiff's property in the chattel as the wrongful detention; and under such a plea, the defendant may show title in a stranger, although he does not connect himself with such title: Id.; *Gerber v. Monk*, 56 Barb. 652; *Kennedy v. Shaw*, 38 Ind. 474; *Lane v. Sparks*, 75 Id. 278; *Caldwell v. Bruggerman*, 4 Minn. 270. But it is held that this rule would not enable one who had taken property from the actual possession of another to justify the taking by the allegation and proof of title in a third person with which he did not connect himself: *Griffin v. Long Island R. R. Co.*, 101 N. Y. 348. If one is peaceably and quietly in possession of a chattel as his own, a person who takes it from him, having no good title, is a wrong-doer, and cannot defend himself by showing that the chattel is not the property of the plaintiff,

but that of a third person: *Jeffries v. Great Western Ry Co.*, 5 El. & B. 802; S. C., 34 Eng. L. & Eq. 122. Nevertheless, in an action of trover against a sheriff's officer for a wrongful seizure of chattels on execution, it was held that the defendant was entitled to show that the plaintiff had no right of possession in his own name: *Stearns v. Vincent*, 80 Mich. 209; S. C., 45 Am. Rep. 37. And the same court declares the true rule to be that the defendant in an action of trover, especially if his claim is made peaceably and in good faith, is entitled to show, as a complete defense, that the title and right of possession was vested in a third person before the suit was brought, although he does not attempt to connect himself with the right and title proposed to be shown: *Benner v. Feige*, 51 Mich. 569; and see, to the same effect, *Blakely v. Douglas*, 6 Atl. Rep. 398 (Sup. Ct. Pa.); S. C., 10 East. Rep. 746.

CARPENTER v. MILLER.

[3 WEST VIRGINIA, 174.]

DEVISE "TO THE PROPAGATION OF THE GOSPEL IN FOREIGN LANDS" IS VOID for uncertainty in the devisee.

SECOND WILL INCONSISTENT WITH FIRST WILL, PERFECT IN ITS FORM AND EXECUTION, but incapable of operating as a will on account of some circumstances *dehors* the instrument, may nevertheless be set up as a revocation of the first.

RULE OF CONSTRUCTION WHERE SECOND WILL IS SET UP TO REVOKE FIRST WILL is, that where the words are imperative, though inoperative by reason of some incapacity in the devisee, they operate a revocation; and where the words are precatory, if the object of the language be certain and definite, the words are considered imperative, creating a trust for the purpose indicated, and operate a revocation. But whenever the prior dispositions of the property are complete, and the words are precatory, and their object uncertain and indefinite, the words will not be held to create a trust or be construed to revoke a former will.

THE opinion states the case.

Lamb and Paul, for the appellants.

By Court, MAXWELL, J. The testator, Miller, by a will made by him bearing date on the fifteenth day of September, 1845, gave all the residue of his property to his friends Chandler and Alderson, in fee-simple, and appointed the said persons the executors of his will. After the death of Miller the said will was probated, and the said Alderson qualified as executor. Afterwards, the appellants here, who claim to be the heirs at law of Miller, filed their bill to have probated and construed a codicil to said will, bearing date on the sixth day of June, 1856, and alleged to be in the possession of the said Chandler and Alderson. The bill claims that the codicil is a revocation of the will as to the residuum, and that the codicil is itself void for uncertainty, by reason of which the testator died intestate

as to the residuum of his property, and it descended to his heirs at law, the appellants.

The codicil is in these words: "I, Peter Miller, of Monroe County, Virginia, do request my executors, H. J. Chandler and L. A. Alderson, to give the entire proceeds of my estate, when said estate shall fall into their hands, according to my will, to the propagation of the Gospel in foreign lands. Given under my hand," etc., and signed by him.

When the cause came on to be heard, the bill was dismissed, but the complainants took an appeal to the court of appeals of Virginia, where that decree was reversed and the cause remanded, with directions to the court below to send the codicil to the county court of Monroe County for probate, that being the court in which the will was probated. The codicil was probated by the county court as a testamentary paper, and afterwards the cause was again heard in the circuit court, and the bill again dismissed, and another appeal taken to the court of appeals of Virginia, whence it has been transferred to this court by operation of law.

The appellants claim that the court erred in dismissing the bill, and not rendering a decree according to the prayer of the bill; that all the property embraced in said codicil passed to the heirs at law of Peter Miller, deceased. The first question to be considered is, whether or not the object expressed in the codicil, "the propagation of the Gospel in foreign lands," is too indefinite and uncertain to be executed.

In a late case, *Wheeler v. Smith*, 9 How. 76, in the supreme court of the United States, this question was examined quite extensively. In the will in that case the testator, after making a number of specific bequests, declared: "The residue of my estate is left in trust of Hugh Smith, Robert J. Taylor, and Phineas Janney, for such purposes as they consider promise to be most beneficial to the town and trade of Alexandria. If any difficulty occurs in construction as to any of my bequests, R. J. Taylor is especially charged to give said construction." The said Smith, Taylor, and Janney were appointed executors. In a codicil the testator declared: "I leave the residue of my estate, after paying all bequests and appropriations, to some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria. Now I leave the same entirely to their disposition of it in such manner as appears to them promises to yield the greatest good."

The court held unanimously that the devisees were too uncertain and could not be sustained. Judge McLean, in delivering the opinion of the court, makes this statement: "In a late case in Virginia, not reported, of *Brand v. Brand*, the following devise was held to be void: 'Third, I give to the Rev. W. J. Plummer, D. D., the residue of my estate, both real and personal, in trust for the board of publication of the Presbyterian Church in the United States.'" I do not find that this case has yet been reported.

All the Virginia cases are to the same effect as the above cases. From the principles laid down in the cases referred to, it is clear that the devise in the codicil under consideration is void for uncertainty in the devisee.

This brings us to the next question, which is, The devise in the codicil being void for uncertainty, does the codicil nevertheless revoke the will as to the property mentioned in the codicil?

It is well settled that a second will, inconsistent with the first, perfect in its form and execution, but incapable of operating as a will on account of some circumstance *dehors* the instrument, may nevertheless be set up as a revocation of the first: 3 Lomax Dig. 61; *Laughton v. Atkins*, 1 Pick. 545.

Story, in his Equity Jurisprudence, volume 2, section 1068 a, says: "In short, it may be stated, as a general result of the cases, in the language of Lord Eldon, that whether the words of the will are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt, if the objects with regard to which such terms are applied are certain, and the subjects of property to be given are also certain, the words are considered imperative, and create a trust." And in section 1070 he says: "Wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the prior dispositions of the property import absolute and uncontrollable ownership,—in all such cases courts of equity will not create a trust from words of this character." The same doctrine will be found in the case of *Moggridge v. Thackwell*, 7 Ves. 84; *Morice v. Bishop of Durham*, 10 Id. 536.

The rule then is, that wherever the words are imperative, though inoperative by reason of some incapacity in the devisee, they operate a revocation of a former will, and whenever the words are precatory, or expressing hope, desire, or request, if the object of the hope, desire, or request be certain and definite, the words are considered imperative, and are held by the courts

to create a trust for the purpose indicated, and operate a revocation of a former will. But whenever the prior dispositions of the property are complete, and the words are precatory, or expressing hope, desire, or request, and the object of the hope, desire, or request be uncertain and indefinite, the words will not be held to create a trust, or be construed to revoke a former will.

In the will of Miller the property is given to Chandler and Alderson, to be equally divided between them, in fee-simple. They are also named as executors. In the codicil the language is, "I do request my executors, Chandler and Alderson, to give," etc.

According to the will, then, they would take the residuum in absolute and uncontrollable ownership, and the objects of the recommendatory trust mentioned in the codicil being uncertain and indefinite, a court of equity cannot, according to the authorities, construe the words of the codicil to create a constructive trust which would fail for uncertainty, merely for the purpose of working a revocation of the will to defeat the residuary devisees.

It seems to me that the decree dismissing the will is right, and that it will have to be affirmed, with damages and costs to the appellees.

The other judges concurred.

Decree affirmed.

DEVISES VOID FOR UNCERTAINTY IN DEVISEES: See *Downing v. Marshall*, 80 Am. Dec. 290, and note 315.

IMPLIED REVOCATION OF WILL: *Jones v. Moseley*, 90 Am. Dec. 327, and cases collected in note 331.

TESTATOR'S DIRECTIONS TO DESTROY WILL DO NOT OF THEMSELVES AMOUNT TO REVOCATION: *Tynan v. Paschal*, 84 Am. Dec. 619, and note 631.

MANN v. LEWIS.

[8 WEST VIRGINIA, 215.]

CONFEDERATE NOTES, PAYMENT IN, UNDER DURESS. — In the year 1864 the county of Greenbrier was under the domination of the so-called Confederate States government. Treasury notes of said government were tendered in payment of a bond to a creditor who was loyal to the Union, and had not demanded the debt, and he refused to accept them. He was then told that he was "obliged to take them under the laws of the confederate government." *Held*, that the payment was void, as made and received under duress *per minas*.

DECREE BY COURT OF EQUITY FOR DEED FROM ONE DEFENDANT TO ANOTHER, in a suit to enforce a vendor's lien, is not matter of which the plaintiff can complain, where the court also decided that he had no lien or right in the premises, and decreed costs against him.

THE opinion states the case.

C. S. Sperry, for the appellant.

N. Richardson, for the appellees.

By Court, BROWN, President. In 1856, John Butler sold to Andrew Lewis a tract of land in Fayette County. Lewis executed his bonds to Butler for the purchase-money, and Butler executed his title bond to Lewis for the land.

In 1859, Butler died, leaving a will, with John Argabrite as his executor, who thereafter took new bonds from Lewis, with William T. Mann as his surety therein, in lieu of the old ones. In 1864, Mann paid off the balance of these bonds, amounting to \$301.59, with confederate treasury notes (so called), and obtained from Lewis a title bond upon a promise to take it to Argabrite, and get Lewis the deed, representing that Argabrite was getting old, and might drop off at any time. Argabrite refused to make the deed, alleging the said treasury notes to be worthless. Lewis then demanded the title bond of Mann, which he refused to give up, saying he intended to keep it until he got his money. Lewis, by his agent, repaid to Argabrite the \$301.59, which Mann had paid in confederate paper, as above stated, with the understanding that Argabrite should make the deed, which he is willing to do. The bill made Argabrite, as executor, and Lewis defendants, and prays that the land be sold to repay to complainant the money paid by him with interest, and for general relief.

The answer of Argabrite alleges that the complainant, by false representations, menaces, and fraud, induced and coerced this respondent to receive the said worthless and illegal notes, and to deliver to him the said bonds.

Lewis also answered the bill, controverting the claims of the complainant.

The charge of fraud and duress having been distinctly made in the answer, and proofs taken to sustain the charge, it becomes necessary to consider and determine that question. Does the evidence sustain the charge? The appellant insists that it does not. And if the occurrence had happened as described in the ordinary times of peace and security, where every man could expect and have the protection of the gov-

ernment and law, it might be very questionable whether the charge of fraud and duress could be sustained in this case. But this case, like every other, must be viewed in the light of the time, place, and circumstances of its occurrence, and of the state of things then existing, and the condition of the country, of which the court must take judicial notice so far as the same have relation and bearing upon the case.

The time, then, of the occurrence was in 1864, in the midst of a fierce civil war. The place was in the county of Greenbrier, which was one of the many counties of Virginia whose citizens were declared by the President of the United States, in his proclamation of July 1, 1862, to be in a state of insurrection against the government and Union.

That the said county at the time was under the domination of the rebel authorities, civil and military, is a matter of public history, and that a citizen who was loyal to the constitution and Union, and to the state of West Virginia, was not secure in standing upon the rights to which he was entitled under the government and laws by which his case is now tried. The evidence shows he was a Union man, and loyal to the Union; that he did not wish to deal in the so-called confederate treasury notes, and refused to receive them; that he did not seek the appellant, but on the contrary the appellant sought him and urged him to take the paper, which Argabrite regarded as worthless, and which could be of no value whatever to those for whose benefit he was acting, viz., the legatees of his testator; but appellant "told him he was obliged to take it, under the laws of the confederate government." To discredit the contraband currency of the Confederacy by refusing to receive it, under such circumstances, might have been hazardous to one not suspected nor chargeable with loyalty to the Union, but to one of known loyal sympathies it was doubtless a cause of serious apprehension when he might consider the historical fact that Libby Prison and Castle Thunder were full of his loyal fellow-citizens, whose only crime was their loyalty to the constitution and the Union. Pressed by a man who was taking advantage of his position to pay a debt in depreciated and illegal paper, for which he was only security (and payment of which was not demanded), threatened with the compulsion of a pretended law of the so-called Confederacy, under such circumstances and such surroundings, and with such hazards before him, and with such cause of reasonable apprehensions of danger, it was not unnatural that he yielded to importu-

nities and threats of the appellant. He cannot be said to have acted freely, or to have consented of his own accord in the eye of the law to receive the contraband and worthless article in discharge of a valid and well-secured debt. It was a case of duress *per minas*. Lord Coke says the fear of imprisonment is enough: 2 Inst. 483; Co. Lit. 253 b.

In the case of *Foskay v. Ferguson*, 5 Hill, 154, it is said: "If a deed might be avoided nearly three centuries ago on the ground that it was procured by threats and the fear of illegal imprisonment, there can be no room for doubt upon the question at the present day. As civilization has advanced, the law has tended much more strongly than it formerly did to overthrow everything which is built upon violence and fraud." And again, it is said by Judge Bronson in the same case: "But I entertain no doubt that a contract procured by threats, and the fear of battery, or the destruction of property, may be avoided on the ground of duress. There is nothing but the form of a contract in such case, without the substance. It wants the voluntary assent of the party to be bound by it. And why should the wrong-doer derive an advantage from his tortious act? No good reason can be assigned for upholding such a transaction."

The court decreed a conveyance from Argabrite to Lewis, and gave costs against the complainant.

It is claimed for the complainant that as he was the security of Lewis he had a right to pay off the bonds, which being dated before the war were good, and was thereby entitled to be substituted to the shoes of Argabrite, the creditor, and thus enforce the vendor's lien on the land, and that as between him and Lewis it was not material how he paid the debt to Argabrite. He also claims this to be an executed contract. But Argabrite rightly insists that cannot be so, since he, the vendor, has not made the deed in pursuance of the contract, and refuses to do so until he shall be paid in good money. And a court of equity will not compel him to do so for a party whose claim is based upon an illegal consideration and transaction as this is: *Brown v. Wylie*, 2 W. Va. 502; and *Calfree v. Burgess*, *infra*.

There was no error, therefore, in refusing the relief which the complainant sought at the hands of the court of equity. Nor was it a matter of which complainant might complain to require the defendant Argabrite to convey to the co-defendant

Lewis, at the expense of the latter, the land which Lewis had paid him for in good money, and thus avoid another suit.

I think, therefore, that the decree of the court below should be affirmed, with costs and damages to the appellees.

The other judges concurred.

Decree affirmed.

THE FACTS AND CIRCUMSTANCES in the case of *Mann v. McVey*, 3 W. Va. 232, are almost identical with those in the principal case in regard to what constitutes duress *per minas*, and the views expressed in the principal case are said to be alike applicable and conclusive of this point. In that case, *Mann v. McVey*, *supra*, a creditor received from the agent of a party acting as an administrator *de son tort* of a deceased debtor (said party having qualified under the confederate authority) the amount of his debt in so-called confederate paper, and surrendered up the bonds during the war of the rebellion. After the war, the creditor instituted suit in chancery against the said agent for his part in the transaction, the bill alleging that the defendant fraudulently and falsely represented to the complainant that the notes had been made a legal tender, and that he was obliged to receive them; and the prayer of the bill was, that the defendant be decreed to pay to the complainant the amount of the bonds claimed to have been thus fraudulently obtained. The court rendered a decree in the complainant's favor, in accordance with the prayer, and the defendant appealed. On appeal, the decree of the court below was affirmed, the court holding that a party acting as agent for another in the payment of confederate treasury notes, under circumstances which amount to duress *per minas*, is responsible for the consequences of his own unlawful acts. "If the representation of the agent that the confederate treasury notes were a legal tender was false, the false representation of so material a fact, under the circumstances of the case, influencing the action and coercing the consent of the creditor to receive a worthless and illegal currency in discharge of a good debt, was a fraud. But if, on the other hand, the statement were true, it was duress *per minas* to make use of it to coerce, in like manner, the unwilling and reluctant assent of the creditor to surrender his rights against his recognized interests."

THE PRINCIPAL CASE IS CITED in a similar case, *Ludington v. Gabbert*, 5 W. Va. 330, 331; and the court say that "if the charge of duress contained in the bill is sustained by the proof in the cause, then it is clear that this case is in principle like *Mann v. Lewis*, 3 W. Va. 215, and *Mann v. McVey*, 3 Id. 232, and must receive the same judgment." But the court in *Simmons v. Trumbo*, 9 Id. 365, 369, declined to follow the principal case and *Mann v. McVey*, *supra*, denouncing them as "unsound in principle," and holding that courts should take judicial notice of the fact that confederate notes were never made a legal tender in the payment of debts by any act of the confederate Congress.

PAYMENT OF DEBT IN CONFEDERATE NOTES RECEIVED BY CREDITOR UNDER DURESS IS VOID, whether or not the debtor knew of the duress: *Emerson v. Lee*, 89 Am. Dec. 648; see *Freeman v. Bass*, 89 Id. 255.

PAYMENT UNDER COMPULSION, WHAT IS, and when the money may be recovered back: See *Brumagim v. Tillinghast*, 79 Am. Dec. 176, and note 184; *Claffin v. McDonough*, 84 Id. 54, and note 57.

BLOSS v. PLYMALE.

[3 WEST VIRGINIA, 382.]

PARTY INJURED BY CO-TRESPASSERS MAY SUE EITHER ONE against whom the action may be brought. He is not bound to prosecute all, and neither the omission to sue all, nor if all are sued the dismissal of one of them from the suit, can be pleaded by the others in bar.

ABSOLUTE RELEASE OF ONE JOINT TRESPASSER DISCHARGES ALL THE REST who participated in the act. But to have this effect, it must be a technical release, under seal, expressly stating the cause of action to be discharged without conditions or exceptions. No release will be allowed by implication.

WHERE CAUSE OF ACTION EXISTS AGAINST ALLEGED JOINT TRESPASSERS, PLAINTIFF MAY SUE ALL or either of them, at his election, and is entitled to full, but to only one, satisfaction; and if the damages have been in part satisfied by payment or compromise with some of the defendants, the plaintiff may still proceed against those who remain on the record. Evidence of a sum received by the plaintiff from one of the defendants, on account of the alleged trespass, is, therefore, admissible in mitigation of damages.

TRESPASS — ESTOPPEL BY PLEA OF "NOT GUILTY."—An action of trespass was brought against several defendants. As to one of them, Jarrell, the case was dismissed by the plaintiff without trial and before plea. He also dismissed the case as to three other defendants before trial. The defendants pleaded "not guilty," and also accord and satisfaction to Jarrell, who was alleged in the plea to be a joint trespasser, and on the trial they offered in evidence the summons and declaration. *Held*, that it was not error to permit the declaration and orders of dismissal to go in evidence, for they were parts of the record; but that the plea of "not guilty" estopped the remaining defendants from using the allegations of the declaration to prove that the released defendant, Jarrell, was a joint trespasser.

NO MATERIAL FACT CAN BE SUPPOSED TO HAVE BEEN OMITTED FROM BILL OF EXCEPTIONS, where it is certified that "the foregoing is all the evidence material in the cause."

ACTION of trespass by the plaintiff Bloss, against the defendant Plymale and ten others. The material facts appear in the head-note and opinion. The jury returned a verdict in favor of the defendants. The plaintiff moved the court to set aside the verdict, and grant him a new trial, upon the grounds that the "said verdict was contrary to the law and the evidence," and "because of the misdirection of the judge in his instructions to the jury." The court overruled the motion, and the plaintiff excepted.

G. W. Jeffers, for the plaintiff.

Lee and Boggess, for the defendants.

By Court, BROWN, President. This is an action of trespass on the case, under the statute authorizing case to be brought for a trespass *vi et armis*.

The action is against several defendants. As to one of them, viz., John Jarrell, Jr., the case was dismissed by the plaintiff without trial and before plea.

All the rest pleaded the general issue, and also the plea of accord and satisfaction. This plea alleges that the agreement of accord and satisfaction was made with the said John Jarrell, Jr., as one of the alleged trespassers, not for his part or participation only in the said trespasses, but in satisfaction and discharge of the alleged trespasses and all damages sustained by the plaintiff from all the said defendants. But before the trial the case was further discontinued by the plaintiff as to three other of the defendants. In support of the plea of accord and satisfaction the remaining defendants offered in evidence the following paper, viz.:—

“Received of John Jarrell, Jr., seventy-five dollars, it being in full of all dues, debts, and demands up to this day and date.

“March 22, 1866.

HIRAM BLOSS.”

[U. S. Int. Rev. 2 cts. bank check.]

Also the writ instituting the suit and the declaration in the case.

The plaintiff objected to this evidence, but his objection was overruled. He then offered to prove, by divers witnesses, that the receipt read in evidence by the defendants was given to settle a claim against the said Jarrell for a horse, and not to settle the cause of action set out in the declaration; but the evidence so offered was excluded by the court at the instance of the defendants, and the plaintiff again excepted.

The first inquiry is as to the effect of the entries by which first Jarrell, and then three other of the defendants, were dismissed from the action; does it apply only to those named, or does it extend equally to all the defendants? It cannot be claimed that these dismissals, which were equivalent only to judgments of *nolle prosequi* at the common law, can operate either for or against the other defendants. No such effect would be produced even in a criminal case.

This was held in *Rex v. Sergeant*, 12 Mod. 320, and is now the settled law.

In the case of *Parker v. Lamon*, decided in the reign of James I., Hob. 70, it was held that a judgment of *nol. prosc.* as

to one or more joint trespassers before judgment would discharge the action. But in the next reign that case was overruled, and the more rational doctrine held that a discontinuance as to one defendant was a mere agreement to relinquish the action as to him only, and he alone could take advantage of it, the plaintiff being still at liberty to proceed against the other defendants: *Wash v. Bishop*, 3 Croke, 243. Since then the current of authority has been uniform on the point: *Noke v. Ingham*, 1 Wils. 90; *Dale v. Eyre*, 1 Id. 306; *Cooper v. Tiffin*, 3 Term Rep. 511. The cases are collected and approved by Williams in his work to *Salmon v. Smith*, 1 Saund. 202, note 2.

They establish fully the rule that a *nolle prosequi* dismissal or discontinuance as to one defendant, before judgment, does not inure to the benefit of the others.

The principle which governs all these decisions implies that the party injured by co-trespassers, or who is the creditor of co-debtors, may sue either one of the individuals against whom the action may be brought; he is not bound to prosecute all; and although a plea in abatement is permitted in case of the non-joinder of debtors, the privilege does not extend to tortfeasors; all are regarded as principals, and neither the omission to sue all, nor if all are sued the dismissal of one of them from the suit, can be pleaded by the other parties in bar.

It was early held that the absolute release of one joint trespasser discharged all the rest who participated in the act, and such is still the rule. But the release pleaded as a discharge for all, that has been given to one only, must be a technical release, under seal, expressly stating the cause of action to be discharged without condition or exception: *Frink v. Green*, 5 Barb. 455; *De Zug v. Bailey*, 9 Wend. 336; *Rowly v. Stoddard*, 7 Johns. 207.

So strictly are these technicalities adhered to that no release is allowed by implication; it must be the immediate result of the terms of the instrument which contains the stipulation; hence it is that a covenant not to sue one joint debtor or trespasser, though it operates between the immediate parties, does not extend to the others.

In the case of *Lacy v. Kynaston*, 1 Ld. Raym. 689, reported also in 12 Mod. 548, it was held that a covenant not to sue was personal to the covenantee only, and could not be set up against the other joint parties. And though such covenant might operate as a release between the parties to it to avoid

circuitry of action, yet it could extend no further: *Farrell v. Forest*, 2 Saund. 48, note 1.

Now, it is clear that the receipt of John Jarrell, Jr., admitted in evidence in this case, was not a technical release. It is not under seal, which is indispensable to constitute a release. A release is an estoppel to the party making it, and imports a consideration from being sealed.

Estoppels are not favored, and should not on principle be extended beyond the natural and ordinary import of the terms used in the instrument to express the meaning and intention of the parties.

The courts in the examination of the numerous decided cases have been required to give a construction to every conceivable stipulation inserted in the agreements which have been pleaded as releases of liability, and have almost invariably pursued the same course in yielding nothing to mere implication wherever words of release are found in the instrument. The intention of the parties is alone regarded, holding the established legal maxim that where a particular purpose is to be accomplished, and the language which expresses it is clear and certain, no general words used in the same agreement shall extend the meaning of the parties: *Thorpe v. Thorpe*, 1 Ld. Raym. 235.

Dallas, C. J., in the case of *Solly v. Forbes*, 2 Brod. & B. 46, having examined the leading cases, observes, as courts look at the intention of the parties in modern times more than formerly, rather than the strict letter, not suffering the latter to defeat the former, held that general words of release even could not be operated to enlarge a previous statement which defined the particular object for which the agreement was made.

The same principle is found in the case of *Turpenny v. Young*, 5 Dowl. & R. 262, and is referred to and affirmed in the case of *Thompson v. Lach*, 3 Moore & S. 551. See also *North v. Wakefield*, 13 Ad. & E. 540, and *Jackson v. Stackhouse*, 1 Cow. 123.

It is very manifest that the defendants well understood that the receipt in question could not be pleaded as a release, and therefore they sought to make it avail them as a defense to the action, and so pleaded accord and satisfaction, upon which the plaintiff took issue. As before remarked, this plea avers the satisfaction and discharge of the entire cause of action, and not simply a satisfaction and discharge of the said

John Jarrell, Jr., with whom the accord is alleged to have been made, from his liability for his participation in the alleged trespasses.

The receipt, however, is of seventy-five dollars from John Jarrell, Jr., in full of all dues, debts, and demands to date. It does not state in terms against whom the dues, debts, and demands are which are thus satisfied. It cannot be pretended to mean all dues, debts, and demands of the plaintiff against everybody, but only of all his dues, debts, and demands against somebody. The natural and ordinary import of the language used, and the nature of the transaction and the character of the instrument, clearly indicate the intention of the parties, and show that the broadest interpretation that can be given to it is satisfaction and discharge of all dues, debts, and demands against the said John Jarrell, Jr., and against him only.

Admitting, then, without now deciding the point claimed for the defendants, that the terms "all dues, debts, and demands" are broad enough to cover, not only the individual liabilities of the said Jarrell, but also his joint liability with the other defendants for the alleged trespasses, yet the said receipt furnishes no evidence of any satisfaction and discharge of the other parties defendant, nor any intention to do so, but, on the contrary, that it was the intention not to do so. And this is corroborated by the dismissal of the suit against the said Jarrell, and the prosecution of it against the other defendants.

Now, it is well settled by the authorities, and upon sound principles, that a release not under seal of one joint trespasser, or a satisfaction and discharge of the liability against him, which shows on its face that it was not the intention to satisfy and discharge the liability of the other joint trespassers, will not and cannot be allowed to work a discharge of the action. In other words, that a contract or agreement, not unlawful in itself, and plain and express in its terms, shall not be construed nor made to defeat the object and intention of the parties, and much less to work a result they sought to avoid.

In the case of *Jackson v. Stackhouse*, 1 Cow. 123 [8 Am. Dec. 514], it was held that a release which acknowledged the receipt of one dollar in full of a certain judgment (describing it), and also in full of all debts, demands, judgments, executions, and accounts whatsoever, was restrained by the

particular words, to the judgment only, and did not operate upon a mortgage between the parties.

So in the case of *McAllister v. Sprague*, 34 Me. 297, where a receipt had been given by a creditor to one of his joint debtors, which recited that the debtor had paid a certain sum in full of his half of the debt due jointly by him and another, and which was to be his discharge in full for the debt and costs in full, was no discharge of the co-debtor, it was held that such receipt and discharge constituted no defense to either in the action against both.

And in *Drinkwater v. Jordon*, 46 Me. 432, the same doctrine is affirmed, and the reason assigned "because it cannot be inferred from such a covenant that it was the intention of the parties to discharge the debt."

In *Durell v. Wendell*, 8 N. H. 369, it is said "a release is an absolute extinguishment of the debt, while a covenant not to sue is not such an extinguishment, and is never a technical release, and will never be construed as a release, unless it gives the covenantee a right of action, which will precisely countervail that to which he is liable, and unless also it was the intention of the parties that the last instrument should defeat the first. Courts in this way overlook the precise character of the instrument, in order most readily to secure the design of the parties." Same doctrine and language by Marshall, C. J., in *Garnett v. Macon*, 2 Brock. 185; S. C., 6 Call, 308. See also *Lovejoy v. Murray*, 3 Wall. 1.

In *Frink v. Green*, 5 Barb. 455, a writing in these words: "I hereby exonerate Alonzo Hyde from three fifty-dollar notes which I hold against him and D. A. Green. (Signed) A. P. Frink,"—was held not to be a release, but only a covenant not to sue, the consideration of which might be inquired into by oral evidence, and that it could not be made a defense to Green, nor evidence to sustain such defense, though the consideration be proven.

These authorities, and others too numerous to mention and explain here, do show that the receipt of John Jarrell, Jr., can be regarded only as an agreement not to sue said Jarrell, and as an acknowledgment of the receipt of seventy-five dollars. It was competent to prove by oral evidence what was the consideration of the agreement: *Knox v. Barbee*, 3 Bibb, 526; *Horton's Appeal*, 38 Pa. St. 294; *Chandler v. Schoonover*, 14 Ind. 324.

As the cause of action is against all the joint trespassers,

the plaintiff may sue all or either of them at his election; and he is entitled to full satisfaction, but he is entitled to but one satisfaction. So where there are different findings in the same verdict when all the trespassers are sued, the successful party must choose *de melioribus damnis*; he cannot claim to collect all.

It follows, then, if the damages are satisfied in part by payment or compromise with some of the defendants, the plaintiff may still proceed against those who remain in the record. And in such case it was but right and proper that the jury should deduct in their finding whatever sum the plaintiff had already received on account of the alleged trespasses from any of the joint parties who were afterwards dismissed. This would be the just application of the rule that there cannot be a double remuneration for the same wrong.

This is very distinctly stated by Judge Upham in *Snow v. Chandler*, 10 N. H. 95 [34 Am. Dec. 140]. "It is," he says, "that the sum paid was not received in satisfaction of the damages, but only in part satisfaction, and the fact that it was coupled with an engagement not to sue does not alter the case. But to the extent of the amount paid, the defendant may avail himself of the arrangement." See also *Merchants' Bank v. Curtis*, 37 Barb. 320.

But the case of *Ruble v. Turner*, 2 Hen. & M. 38, has been cited and relied on to show the contrary doctrine to that of the cases above referred to; and I am free to confess that it seems not only irreconcilable with the current of authorities, but untenable on principle. It seems also in conflict with the principle of *Herrington v. Hurkins*, 1 Rob. (Va.) 591. The case of *Ruble v. Turner*, *supra*, was decided in 1808, and the case of *Garnett v. Macon*, *supra*, in 1825. The same point was involved in both cases, viz., whether the release of one of several joint parties discharged the rest from liability, and argued by the same learned counsel, viz., Messrs. Hay and Call; and yet there is not the slightest allusion that I have been able to discover in the latter case to the former, nor even by Marshall, C. J., who reviewed the authorities and considered the subject with his acknowledged ability and learning. It can hardly be supposed the case was overlooked. Nor have I found it relied on, or approved, or even noticed, in any of the numerous cases decided by the courts of other states on the same subject. I feel constrained, therefore, to hold that it does not propound the law as applicable to this case.

Applying, then, the principles deduced from the authorities reviewed, I think there was no error in permitting said receipt to go to the jury, because it was legitimate to prove how much the plaintiff had received on account of the participation of the said Jarrell in the alleged trespasses, if the evidence should show him to have been a co-trespasser, so that it might be applied by the jury to diminish their verdict by that amount against the rest of the defendants on the record.

There was no error in permitting the writ to go in evidence, for it was the proper evidence to show the existence and date of the suit, and who were the original parties.

There was no error in permitting the declaration to go in evidence with the orders of dismissal, for they were parts of the records of the case. But as the plea of not guilty put in issue the allegations of the declaration, and thus threw on the plaintiff the burden of proving them, they could not be used by the defendants as evidence to prove and sustain their plea of accord and satisfaction. As to that plea and all facts necessary to sustain it, the *onus probandi* was upon them, and they could not resort to the plaintiff's allegations in his declaration to aid them in it after having denied the same by their plea of the general issue. Consequently, the allegation in the plea of accord and satisfaction that John Jarrell, Jr., was one of the joint trespassers, which was denied by the general replication, could not be proved by the allegations in the declaration that he was such joint trespasser with them, but which was denied by the plea of not guilty, and the court should so have instructed the jury if required; but as the plaintiff asked no such instruction, and had chosen to rely upon his general objection to the evidence offered, which was unexceptionable, as above indicated, I think there was no error in that particular of which the plaintiff can complain. But inasmuch as there was no other evidence in the cause showing the said John Jarrell, Jr., to have been a joint trespasser with the other defendants, an indispensable fact to sustain the plea of accord and satisfaction alleged to have been made with him as one of the joint trespassers, which was not proved, and the verdict on that point without evidence to warrant it, while the evidence on the general issue showed the defendants guilty. On that ground, therefore, if there had been no other, verdict should have been set aside.

The court erred in refusing to give the second, third, and fourth instructions asked by the plaintiff, and also further

erred in giving the fourth, fifth, and sixth instructions asked by the defendants. The court further erred in refusing to set aside the verdict, because it was contrary to the evidence, and because of misdirection by the court.

The exception to the bill of exceptions as being too general and as obnoxious to the admonition given in the case of *Hood v. Maxwell*, 1 W. Va. 219, though the bill be inartificially drawn in some respects, I think the exceptions are sufficiently certain and specific to present the action of the court below in every substantial particular, and so as to enable this court to review its action intelligibly.

It is also objected that the concluding statement in the bill, that "the foregoing was all the evidence material in the cause," is too vague and uncertain, because it was said that the opinion of the court below ought not to determine what is material and what is not. But I think this substantially like certifying the facts proved instead of the evidence; and no material fact can be supposed to have been omitted from a bill so certified by the court, and with the presence and aid of the counsel on both sides.

I am of opinion, therefore, to reverse the judgment with costs and damages to the plaintiff in error, set aside the verdict, and remand the cause to the circuit court of Wayne County for further proceedings to be had therein, in conformity with the principles above indicated.

The other judges concurred.

Judgment reversed.

ANY PERSON PRESENT AT COMMISSION OF TRESPASS, WHO IN ANY WAY OR BY ANY MEANS COUNTEANCES or approves the same, is in law deemed to be an aider and abettor, and liable as a principal: *McManus v. Lee*, 97 Am. Dec. 386, and note 389.

LIABILITY OF CO-TRESPASSERS: See *Kirkwood v. Miller*, 73 Am. Dec. 134, and extended note on subject 137-149.

THE PRINCIPAL CASE IS CITED as maintaining the principle in substance, that a judgment against one joint trespasser is no bar to a suit against another for the same trespass, and that nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar, in *Griffie v. McClung*, 5 W. Va. 134; and is cited to the point that in the absence of any technical release or discharge, under seal, of one joint trespasser, the receipt of money from one, with an agreement not to prosecute him when such money is received only as a part satisfaction, discharges the others only *pro tanto*, in *Ellis v. Eason*, 50 Wis. 153.

RAND v. HALE.

[3 WEST VIRGINIA, 496.]

PLEA OF PAYMENT IN ACTION ON BILL OF EXCHANGE CONFESSES the cause of action as set forth in the declaration, and it is error to permit evidence to be heard or to require the plaintiff to answer interrogatories tending to show that the bill was not made by the defendant in his individual capacity, but as president of a corporation.

DRAWER OF BILL OF EXCHANGE, SIGNED "CHAS. F. HALE, Pres't," IS INDIVIDUALLY LIABLE THEREON. The addition of the word "Pres't" to his signature does not shift the responsibility from him to a company of which he was president, so far as the holder is concerned.

ACTION of debt on a bill of exchange. The bill was drawn at sixty days after date, payable to the order of the plaintiffs, and signed "Chas. F. Hale, Pres't." It was duly protested for want of payment. Other material facts appear in the opinion. Judgment was rendered for the defendant in the court below, to which judgment the plaintiffs obtained a writ of error and *supersedeas*.

B. H. Smith, for the plaintiffs in error.

Lamb and Paull, for the defendants in error.

By Court, BROWN, President. This was an action of debt on a bill of exchange, and the only plea in the cause was a plea of payment.

And the first question to be determined is, whether in such case the plea confesses the cause of action as set forth in the declaration, or in other words, admits the bill of exchange as described.

It is contended for the defendant that it does not, and that the plaintiff is bound notwithstanding to prove his case by the production of the bill of exchange corresponding with that described in his declaration. It is well settled that if the defendant had pleaded payment and *nil debet*, or any plea that could raise the general issue, the plaintiff would have been put upon the proof of his case.

It is equally true that under the statute where judgment has been entered and confirmed by default, and not set aside before the fifteenth day of the next succeeding term of the court, that it is necessary to produce the bond or note to the clerk to enable and to guide him in issuing the execution on the judgment, and give such credits as may be indorsed thereon.

The case of *Moore v. Fenwick*, Gilmer, 214, relied on by the

defendant, will be found to turn upon the fact that it was an action on a penal bond, with condition to be discharged by the payment of a different sum, etc.

In such a case, the declaration need only state the penal sum, and not notice the condition, and if the defendant fail to crave oyer of the bond and condition, or otherwise plead the condition, the real matter of litigation would not come to the notice of the court, unless the bond declared on, of which profert had been made, were produced.

There would seem, therefore, more reason for the production of the bond in such a case than in the case of a simple note or writing obligatory of bill or exchange for a sum certain with no such collateral condition.

And the court in that case assigns, as the reason why a bond of which profert has been made should be produced, that "in all actions of debt upon bonds for the payment of money, judgment is to be rendered for the penalty to be discharged by the payment of the principal money and the interest due thereon, which cannot be ascertained but by inspecting the same to see the amount and dates of the credits indorsed thereon." That this decision was made under the influence and in effectuation of the statute is manifest from the words of Judge Coalter in the case. "He [the defendant] had a right to see the bond, and take advantage of the condition. If he had pleaded regularly, it would have been after taking oyer of the bond and condition, which would in that case have made them part of the declaration, and then he could have pleaded *non est factum*, or have demurred for the variance; but if he had, after oyer, pleaded payment, could he then take advantage of the variance? I incline to think not. Before the statute, the defendant, to avail himself of the condition, must have taken oyer and pleaded payment before the day. Since the act, he may plead payment before suit brought; but I do not understand that this act changes the form of pleading.

"The plea of payment is an affirmative plea, and the defendant takes the *onus probandi* on himself, and has the right to introduce his evidence, and to open and conclude the argument. If the plaintiff was bound to produce his evidence first, then he would have the *onus probandi* on him, and could open and conclude. The plea is not to the bond; it is that he has paid the debt in the declaration mentioned; had he craved oyer, and pleaded *non est factum*, the *onus probandi* would be

on the plaintiff. Every plea in bar must go to the whole action,—must either deny that the cause of action ever existed as *non est factum* to a bond, or must confess the original cause of action, and avoid it by matter since as payment; a plea by a party in court confessing and avoiding cannot have a less effect as to the admission of the debt originally than a judgment by default.

“In slander, if justification be pleaded, and the defendant fails in his proof, speaking the words need not be proved to entitle the plaintiff to full damages. So if payment is pleaded to a bond with the condition to pay a less sum, if the defendant does not crave oyer of the condition he cannot avail himself of it on the trial, except by virtue of the statute, in which case the court is *ex officio*, if required, to enter judgment according to the condition.”

Judge Tucker, in a note on the case of *Moore v. Fenwick*, *supra*, says the “plea of payment in England admits the bond, and it need not be produced in evidence; but in Virginia it is said where profert is made the defendant has a right to have the bond produced, and if when it is produced there is a variance, it is fatal. Yet though there be profert, it has been decided that on the plea of payment a copy may be given in evidence if the original be proved to be lost.”

This ruling, in an action upon a penal bond, with collateral condition, of which profert has been made under the influence of the statute which authorized the court *ex officio*, if required, to enter judgment for the condition, should not be extended further than the class of cases which required it.

It ought not to be, as it surely was never intended, to subvert the well-settled rules of pleading and evidence in all other classes of cases not required by the rule, nor within the influence of the principle or the statute affecting that case.

The very object of pleading is to produce an issue or an agreed state of facts. If the pleadings result in an issue, the parties proceed to settle that issue by proofs; but if the pleadings result in an admitted or agreed state of facts, there could be no need of proofs, for the end is attained, and there is nothing further to be done but to pronounce the judgment of the law upon the facts confessed.

The plea of payment admits the debt. “It is not to the bond,” as Judge Coalter said in the case of *Moore v. Fenwick*, *supra*, and “it admits the bond,” as Judge Tucker says is the rule in England; and I have no hesitation in saying it is

equally the rule in West Virginia, and wherever else the common-law rule prevails, and this view of the case is fully sustained by the case of *Hubbard v. Blow*, 4 Call, 224.

I think, therefore, that the circuit court erred in requiring the plaintiffs to answer the interrogatories which were immaterial to the issue, if the plea of payment be held the only plea in the cause, which was, whether or not the defendant had paid the debt in the declaration mentioned. For the same reason the court erred in overruling the plaintiff's objection to the admission as evidence of the said interrogatories and the answer thereto, and all the other evidence offered to show that the debt was not and never had been the debt of the defendant, but was a debt of the Forest Hill Mining and Manufacturing Company,—in fine, all the evidence offered and tending to disprove that the cause of action ever existed which the plea had confessed.

And for the same reason the court erred in overruling the plaintiff's motion for a new trial.

But the important question still remains, and that is, whether upon the facts of this case, as shown by the record, if the defendant had pleaded the general issue in addition to the plea of payment, and thereby put the plaintiffs to the proof of their case, the finding and judgment for the defendant were or were not sustained by the evidence.

And this becomes the more important, as it was claimed in the argument that in fact the plea of *nil debet* was pleaded, and the case tried upon that plea and the plea of payment, but that by some inadvertence the clerk omitted to enter the plea upon the record.

This view is strongly corroborated by the record, which states that the "parties again came, by their attorneys, and thereupon the demurrer of the defendant to the plaintiff's declaration being argued and considered was overruled. And neither party desiring that a jury should be impaneled to try the issues in this cause, the court, in lieu of a jury, proceeded to try the same, and having heard the evidence was of the opinion that the plaintiffs were not entitled to recover of the defendant in this action."

It is unquestionable, then, that there was some other plea in the case than the plea of payment, upon which issue was joined, and upon which, as well as upon the plea of payment, the trial was had. But what that plea was is not stated, though the circumstances lead to the supposition that it was

the general issue. If, therefore, the evidence in the cause should be held not only applicable but sufficient to sustain that issue, since the appellate court can only determine what appears upon the record, it might become necessary to reverse the judgment and remand the cause, with the leave to the defendant to replead.

Considering, then, the case on its merits, which is the real question in the cause, it becomes important to determine whether the evidence sustains the findings and judgment on the general issue. In other words, whether the bill of exchange sued on was the personal and individual contract of the defendant, Hale, or whether it was not. The learned counsel for the defendant has argued with force and ingenuity to show that upon the case made, the Forest Hill Mining and Manufacturing Company was liable. However that may be, it is not necessary to the determination of this case, nor is it the inquiry we are called on to investigate. The true question is, whether or not the defendant is liable. And after a careful consideration of the subject, and a review of the authorities cited in the argument, I am led to the conclusion, without hesitation or doubt, that the defendant was liable personally on the bill of exchange, which, as between him and the holder, is his own individual contract and undertaking; in other words, it purports on its face to be the order of the defendant, and the addition of the word "Pres't" to his signature does not shift the responsibilities from him to the company of which he was the president, so far as the plaintiffs are concerned.

I think, therefore, that the judgment should be reversed, with costs to the plaintiff in error, the verdict or finding set aside, and the cause remanded to the circuit court of Kanawha, to be there proceeded in, and a new trial granted the plaintiff, upon payment of the costs occasioned thereby. And upon said new trial to be had, the said circuit court is to conform to the principles above indicated.

The remaining members of the court concurred.

Judgment reversed.

PARTY SIGNING PROMISSORY NOTE WITH ADDITION OF WORD "TRUSTEE" TO HIS NAME IS PERSONALLY LIABLE: *Conner v. Clark*, 73 Am. Dec. 529, and cases collected in note 530. Compare *Pease v. Pease*, 95 Id. 225.

CHAPLINE v. CONANT.

[3 WEST VIRGINIA, 507.]

MERE PAYMENT, OR PROMISE TO PAY, OUT OF PROFITS OF BUSINESS ENTERPRISE a sum of money as a specific proportion of the profits does not necessarily constitute the payee a partner, and gives him no interest in the profits or right thereto, but only a personal claim for such share thereof after they are ascertained and may be divided.

ONE WHO HAS NOT BEEN HELD OUT AS PARTNER CANNOT BE CHARGEABLE as such, unless he has some ownership in or control over the profits as they accrue, and are not ascertained or divided into portions or dividends.

AGREEMENT IN PARTICULAR CASE CONSTRUED, and held not to constitute a partnership.

ACTION of debt on two bills of exchange, the defendants being sued as partners. The opinion states the material facts. Verdict and judgment for the defendants.

George B. Caldwell, for the plaintiffs in error.

James S. Wheat, for the defendants in error.

By Court, BROWN, President. This is an action of debt against Conant and Wheat on two bills of exchange, drawn by the plaintiffs and accepted by Edwards and Conant. Conant and Wheat are sued as partners, under the style of Conant and Wheat.

The defendants pleaded *non assumpsit*, upon which plea there was issue, and the defendant Wheat also filed with his plea an affidavit denying the alleged partnership, thus putting the plaintiffs on the proof of the partnership as alleged.

Wheat was examined as a witness for the plaintiffs on the trial, and testified that he had never taken any share in the conduct or control of the business of the firm of Edwards and Conant; that he had never at any time been a partner with Henry Conant or with any one else in the firm of Edwards and Conant, and that he was not now a partner in said firm. At the plaintiff's request, said James S. Wheat produced an article of agreement, which was put in evidence by the plaintiffs, in the following words and figures, to wit:—

“Mem. of an agreement made and entered into this seventh day of December, in the year 1865, by and between Henry Conant, Michael Edwards, Jr., and James S. Wheat, trustee for Mrs. Mary Edwards, the wife of said Michael Edwards, Jr., all of the city of Wheeling, and state of West Virginia.

“Whereas, the said Henry Conant and James S. Wheat, as

such trustee, on the twenty-eighth day of March, 1865, at a public auction held at the front door of the court-house for Ohio County, by Daniel Lamb and S. Brady, commissioners, purchased the lots Nos. 3 and 7, in square No. 1, in the city of Wheeling, and parts of lots No. 7 and 8 in the same square, whereon is erected the hotel known as the Sprigg House, of which they are the owners as tenants in common, and not as joint tenants, and have in like manner purchased the unexpired term of a lease on said premises held by Thomas Brues, together with a portion of the furniture in said house heretofore owned by said Brues; and have further agreed to purchase, in like manner, the furniture and other things necessary for the said hotel, and to repair, refit, and equip the said hotel in a suitable and proper manner at the joint and equal expense, costs, and charges of the said Henry Conant and James S. Wheat, as such trustee.

"Now, it is agreed between Henry Conant and Michael Edwards to form a copartnership for the purpose of keeping the said hotel, upon the following terms, that is to say:—

"1. The said business shall be conducted under the firm name and style of Edwards and Conant.

"2. Each of said partners shall devote his whole time, with his utmost skill, to the business of the firm, excepting that Henry Conant may, from time to time, pursue his business on the river as a pilot, with the consent of his copartner.

"3. Neither partner shall sign the name of the firm to any note, bill, or other writing, excepting in the regular and ordinary course of the business of the said firm.

"4. The losses of the said business shall be paid equally by the said Henry Conant and the said James S. Wheat, as such trustee, and during the continuance of the said business, and until the whole of the debts and liabilities therein contracted and incurred shall have been fully paid off and discharged, the said real estate, with its buildings and appurtenances, shall be taken and held, together with the furniture and fittings in said hotel, as liable for the payment and satisfaction thereof. The profits of said business, being the balance of the gross receipts after the payment of all expenses, including taxes, repairs, and premiums for insurance upon the said real estate, and all other proper and legitimate charges, shall be divided equally between the said Henry Conant and the said James S. Wheat, as such trustee.

"5. The said Michael Edwards, Jr., shall not be held liable

as a partner by either the said Conant or the said Wheat, as such trustee, for the payment of any loss whatever, nor shall the said Edwards be entitled to any share or portion of the profits of the said business, either directly or indirectly.

"6. Proper books of account shall be kept, in which shall be fairly and correctly entered all the transactions of said business at all times, showing the true state and condition thereof. The said books shall be at all times open to the inspection of the said James S. Wheat, as such trustee; and the said Henry Conant shall, from time to time, pay to the said James S. Wheat the one moiety of the net profits of the said business, to be by him received and held as trustee for the sole and separate use of Mrs. Mary Edwards, the wife of Michael Edwards, Jr., freed and discharged from all interest or contract of her said husband.

"Witness the following signatures:—

"H. CONANT,

"MICHAEL EDWARDS, JR.,

"JAMES S. WHEAT."

It was testified by said witness that, in pursuance of said agreement, he had, as trustee for Mrs. Mary Edwards, placed several thousand dollars in business, as agreed to be done by him in said article of agreement, and under the conditions stated therein, out of the funds, etc., held in trust by him for Mrs. Mary Edwards. The plaintiff also put in evidence two certain bills of exchange, in the words and figures following, to wit:—

"\$219.

PHILADELPHIA, September 17, 1867.

"Four months after date, pay to the order of ourselves two hundred and nineteen dollars value received, and charge the same to account of

CHAPLINE, LEWIS, & Co.

"To Edwards and Conant, Sprigg House, Wheeling, West Virginia.
(*Edwards and Conant.*)"

[10 cents U. S. stamp.]

Indorsed: "Chapline, Lewis, & Co., pay to the order of George Adams, cashier, for remittance," which was duly protested.

"\$125.35.

PHILADELPHIA, November 2, 1867.

"Four months after date, pay to the order of ourselves one hundred and twenty-five dollars and thirty-five cents, value received, and charge the same to the account of

"CHAPLINE, LEWIS, & Co.

"To Edwards and Conant, Wheeling, West Virginia.

"(*Edwards and Conant*, November 21, 1867.)"

[10 cents U. S. internal revenue stamp.]

Indorsed: "Chapline, Lewis, & Co.," with protest as hereinbefore set forth.

The witness, James S. Wheat, further stated that the acceptance of said bills of exchange are in the handwriting of Michael Edwards. This statement was not made in response to any question of the plaintiffs.

The plaintiffs, after the argument of the case by counsel, moved the court to instruct the jury as follows, to wit:—

"The court is asked to instruct the jury that it is the law that a dormant partner, who takes no part in the conduct of the business, is liable as a partner if he furnished part of the capital, and is to participate in the profits or losses. And secondly, that a trustee, who undertakes to trade with the trust funds for the benefit of those for whom the funds are held in trust, is personally liable on all contracts he makes in such trade as partner or individually,—which instructions the court refused to give to the jury, and thereupon said ruling was excepted to by the plaintiffs."

On motion of the defendants, the court instructed the jury as follows, to wit:—

"The court is of opinion, and so instructs you, that said agreement does not create a partnership between Henry Conant and James S. Wheat, under the firm name of Edwards and Conant." To which last-mentioned ruling of the court the plaintiffs also excepted.

The important question to be determined is, whether, upon these facts, the trustee, Wheat, was a partner of the firm, as alleged.

The evidence shows an express partnership between Conant and Edwards, for the purpose and business of keeping a hotel. It further shows that Conant and Wheat, as trustee of Mrs. Edwards, owned the hotel and furniture thus to be kept, which they, the said trustee and Conant, were to repair, refit, and equip, and furnish in a proper and suitable manner, at their joint and equal cost.

The partnership business was to be, and was in fact, conducted under the firm name of Edwards and Conant.

The compensation of the said trustee, somewhat in the nature of rent for his half of the hotel and furniture used by the firm of Edwards and Conant, was to be the balance of the

gross receipts from the business after the payment of all expenses, including taxes, repairs, and premiums for insurance upon the said real estate, and all other proper and legitimate charges.

It was further provided that the profits of said business, being the balance of the gross receipts after the payment of all expenses, including taxes, repairs, and premiums for insurance upon the said real estate, and all other proper and legitimate charges, shall be equally divided between the said Conant and the said Wheat, as such trustee. This would seem to be in compensation in the nature of rents, issues, and profits for the use of the hotel and appurtenances in which the business of the firm was to be conducted.

It is apparent that Conant was a man of means, and it is equally inferable that Edwards was not.

As Conant, therefore, would be liable *in solido* for the debts of the firm of Conant and Edwards, it is natural enough that he should have required that Wheat, as trustee, should be bound to pay one half of the losses, since he was to have the gross profits, after deducting certain costs, etc., equally divided between Conant and the said trustee. This provision is inconsistent with the relation of partner to the firm, because by the provision Wheat is only to be liable to pay one half the loss. If a partner, he would have been liable *in solido* as to third parties, and as to a third part only *inter se*. And as the compensation, in the nature of rents, for his half of the joint property used was to be one half, that is to say, the said Edwards's half of the profits, and after deducting the costs specified, after the same should be ascertained and divided, it was provided, for the trustee's security, that the said Edwards should not be entitled to the same, that is, the same should not be paid over by Conant to him, but to the said trustee.

It is claimed that because the agreement secures to the trustee, Wheat, the right to inspect the books of the firm of Edwards and Conant, and require an account, that that is a test of partnership. Undoubtedly, every partner has a right to an account of the profits; but the converse is not true, that every one who has such a right is a partner. There are many ways in which a man may represent another, and in that right be entitled to an account, without being liable as a partner: Parsons on Partnership, 92.

Unless the purport of an agreement be clearly contrary to the declared intention of the parties, the declared intention

should be regarded in giving construction to the agreement: Parsons on Partnership, 82. Now, the evidence here shows that it was not the intention of Wheat to become a partner, nor of any of the firm that he should, nor was it the understanding of any of them that he was such, nor did he act or hold himself out as such.

But it is urged for the plaintiff that inasmuch as the trustee, Wheat, was to participate in the profits, he was a partner, and the rule laid down in the case of *Waugh v. Carver*, 2 H. Black. 235, is relied on in support of the position.

It cannot be overlooked that the rule as there laid down has been seriously questioned in the latitude of its expression, as broader than the point actually decided. And it is equally certain that the current of modern authorities, while adhering to the principle of that case, have greatly restrained its operation and defined more clearly and precisely the ground on which it rests. The whole subject is considered, and the authorities, English and American, reviewed, in Parsons on Partnership.

The principles of the law of partnership lead to the conclusion that, if a trader makes an arrangement in regard to a commercial business with another, by reason of which that other becomes interested as owner precisely as the first is interested as owner in the resulting profits, whatever be their respective proportions, while they are undivided and remain as profits, these two are certainly partners. And the same principles lead us directly to the other conclusion, that a mere payment, or promise to pay, out of the profits, a sum of money as a specific proportion of the profits, does not necessarily constitute the payee a partner, and gives him no interest in the profits, and no right to the profits, but only a personal claim for such share of the profits, after they are ascertained and may be divided.

"Our conclusion is," says the learned author, "that the question of interest in the profits as such (by which we mean the profits before they are ascertained and divided) is always to be inquired into. The words which the parties use, and all of them and all the parts and provisions of their agreement, as well as its general character and their relation to each other, are to be looked at, and if the whole evidence leads to the conclusion that it was not the intention of the parties that the receiver should acquire any interest in or control over the business, or in the profits as they accrue, and before they are

ascertained and divided, but only after they are ascertained, to find in them the fund and in their amount the measure of his payment, he is no partner, nor liable as such. And the true test is, Did the supposed partner acquire by his bargain any property in or control over the profits while they remained undivided? If so, he is liable to third persons; and otherwise, not."

This subject is certainly one of the most interesting, and perhaps one of the most difficult, in the whole law of partnership. The authorities are in no inconsiderable conflict. Still the tendency of the cases, and especially of the later and better considered ones, we believe, will be found on the whole in favor of the doctrine as restricted and stated above.

We think the error in stating the rule in its amplitude lies, not in declaring that "a specific interest in profits as profits" makes one a partner as to third persons, but in assuming that a stipulation for a certain share of the profits necessarily give such specific interest, or in other words an ownership, in the profits, before and as they accrue, and in contradistinction to the right to have a certain or uncertain amount paid out of the profits after they had been ascertained and divided. And this distinction is sustained by numerous decisions. Thus it has been uniformly held, both in this country, as in England, that mariners who receive for their wages a share in the profits of a voyage are not thereby made partners, either as to rights or liabilities: *Rice v. Austin*, 17 Mass. 197; *Grozier v. Atwood*, 4 Pick. 234; *Coffin v. Jenkins*, 3 Story, 108; *The Crusader*, 1 Ware, 438; *Reed v. Hussey*, 1 Blatchf. & H. 529; *Parsons on Partnership*, 81, note l.

The principle governing the courts in these agreements with sailors is, that all the circumstances being considered, the conclusion is deduced that the parties never intended to give, nor did give, to the mariners the interest as owners in the undivided profits. So in *Baxter v. Redman*, 3 Pick. 435, it was held "that although the officers and seamen respectively were to receive a share of the net proceeds of the oil obtained in a whaling expedition for their services, yet they were not partners, nor part owners of the oil with the ship-owners; but, on the contrary, the oil before division was the property of the ship-owners, and being theirs in the first instance remained so until some settlement and adjustment."

In the case of *Holmes v. Old Colony R. R. Co.*, 5 Gray, 58, the Old Colony Railroad Company leased to Parker and Tri-

bon a hotel, and was to receive for the use of the premises "in addition to the sum of five hundred dollars for the use of the furniture, one half of the net proceeds arising from keeping the house as a hotel." The court said: "Whatever doubts may formerly have existed as to the effect of an arrangement like that made in the present case, entitling the lessee to receive as compensation for the use of his property or capital stock one moiety of the net proceeds arising from the business transacted, that question seems now fully settled, at least in this commonwealth. It is no longer true that receiving one half of the profits, or one half of the net profits, arising from articles manufactured and sold, or resulting from business in which one furnishes the stock in trade and another performs the labor, necessarily creates a partnership. It is always competent to look at the particular circumstances of the case, and ascertain thereby whether it may be a mere compensation to a party for his labor or services, or for furnishing the raw materials, or a mill privilege, or a factory, from which the other is to earn profits: Story on Partnership, sec. 36; Parsons on Partnership, 84, note.

The question was fully considered in the case of *Denny v. Cabot*, 6 Met. 82, and held that where a party is to receive a compensation for his labor in proportion to the profits of the business without having any specific lien on such profits to the exclusion of other creditors, there seems to be no reason for holding him liable as a partner, even to third persons.

In *Bradley v. White*, 10 Met. 303 [43 Am. Dec. 435], where the question arose upon an agreement that A should furnish the goods for a store and pay all expenses, and B should transact the business of the store, and receive half the profits for so doing, it was held that this did not constitute B a partner, and that he was not liable to a creditor who had furnished goods for such store.

Again, where it was stipulated that the owner of a vessel should receive a certain percentage on the profits of the voyage, it was held that such an interest in the profits did not constitute a partnership: *Reynolds v. Tappan*, 15 Mass. 373 [8 Am. Dec. 110]; *Cutler v. Winsor*, 6 Pick. 335.

In the case of *Bowyer v. Anderson*, 2 Leigh, 550, the owner of a public ferry leased it to F. for two years for one thousand dollars paid, and if the net profits of the ferry did not yield F. two thousand dollars within the two years, F. should hold over the term until the profits did yield the two thousand dol-

lars; but if the profits yielded more than the two thousand dollars within the two years, the excess was to be equally divided between them: held, not to constitute a partnership, nor to render the owner liable to third parties for the lessee's negligence during the tenancy, although the owner was to participate in the profits in a certain contingency. In this case Judge Brooke said: "It is not uncommon in farming leases that the rent is stipulated to be paid in a certain portion of the profits, yet no partnership is inferred from that circumstance."

So in the case of *Vanderbaugh v. Hall*, 20 Wend. 70, where the question was, whether a person with a salary of three hundred dollars guaranteed to him, and a right to one third of the profits, if there were any, though he was not to be liable for losses, was a partner as to third persons with the plaintiff; and it was held that he was not a partner, and was a competent witness for him: See also *Fitch v. Hall*, 25 Barb. 13; *Dunham v. Rogers*, 1 Id. 255; *Johnson v. Miller*, 16 Ohio, 431; *Reed v. Murphy*, 2 G. Greene, 574; *Hodges v. Dawes*, 6 Ala. 215; *Scott v. Campbell*, 30 Id. 728; *Shropshire v. Shepherd*, 3 Id. 733; *Bartlett v. Jones*, 2 Strob. 471 [49 Am. Dec. 606]; *Brockway v. Burnap*, 16 Barb. 310.

From this review of the leading cases and others, we conclude that the rule of *Waugh v. Carver*, 2 H. Black. 235, in the amplitude in which it has usually been stated in the *dicta* of many distinguished jurists, to the effect that an indefinite participation in the profits makes one a partner as to third persons, because by such participation the fund on which creditors rely is diminished, is not established nor sustained by the mass of either English or American authorities. And the very recent decisions in England, both in the courts and house of lords, *Wheatcroft v. Hickman*, 9 Com. B., N. S., 99 Eng. Com. L. 47, S. C., 8 H. L. Cas. 268, have gone, if we may judge from the note of them in the law reviews, even beyond the American courts in condemnation of the broad principle so early announced, and concur in giving to it a more restricted, rational, and practical application to the business of the times.

We are constrained, therefore, notwithstanding the imposing and conflicting *dicta* apparently to the contrary, to conclude that the cases show that there are but two grounds upon which a person can be made liable as a partner to third persons; and that if a man has not been held out as partner, he can be

chargeable as such only when he holds that relation to profits, which we believe to be the ultimate test of partnership, both *inter se* and as to third persons; that is, unless he has some ownership in or of the profits as they accrue, and are not ascertained or divided into portions or dividends.

See also, on this question, *Gibson v. Stone*, 43 Barb. 285; *Conklin v. Barton*, 43 Id. 435; *Smith ads. Parry*, 29 N. J. L. 74; *Voorhees v. Jones*, 29 Id. 270; *Berthold v. Goldsmith*, 24 How. 536; *Stevens v. Faucet*, 24 Ill. 483; *Robins v. Larwell*, 27 Id. 365; *Fawcet v. Osborn*, 32 Id. 411 [83 Am. Dec. 278]; *Macy v. Combs*, 15 Ind. 469; *Reynolds v. Hicks*, 19 Id. 113; *Braley v. Goddard*, 49 Me. 108; *Atherton v. Tilton*, 44 N. H. 452; *Whitney v. Luddington*, 17 Wis. 140 [84 Am. Dec. 734]; *U. S. Bank v. Binney*, 5 Mason, 176, 182; *U. S. Bank v. Binney*, 5 Pet. 529; Story on Partnerships, secs. 36, 38, 70.

Applying, then, the principles deduced from the cases thus considered, let us see if the case here wears the impress of a partnership, either *inter se* or as to third persons.

And first, it was not the intention of the parties that the trustee, Wheat, should be a partner, nor liable as such, nor was he to have any part or lot in the management and control of the business of the partnership, nor did he in fact exercise, or attempt to exercise, any such control.

In the second place, he was not held out as a partner.

In the third place, his participation in the profits was to be only after they were ascertained and apportioned and divided, when the portion so divided, which would have belonged to the partner Edwards, was to be paid by the other partner Conant, to the trustee, Wheat, and not to Edwards in any event; and until such ascertained apportionment and division of the profits, the said trustee had no specific interest in, ownership of, or lien upon the said profits as would prejudice or take precedence of other creditors of the firm of Edwards and Conant; and even then his participation was only to be in the balance after deducting taxes, repairs, insurance on the property, and all other proper and legitimate charges. Here there was no such participation in the profits, as profits, before ascertainment and division, but only in the profits, if any, that would have been apportionable to the partner Edwards (but who was not to receive them), after such ascertainment and division.

Considering, then, the words which the parties have used, and all of them, and all the parties and provisions of their

agreement, as well as the general character and relation to each other, the true test is, Did the supposed partner, Wheat, acquire by his bargain any property in, or control over, or specific lien upon, the profits while they remained unascertained and undivided, in preference to other creditors? If so, he is liable to third persons; and otherwise, not. And so considering, we are constrained to hold him not liable, neither *inter se* nor as respects third persons dealing with the partnership, since the facts of the case fail to constitute him a partner in any sense.

I think, therefore, that the court below committed no error in giving to the jury the instruction asked by the defendants, to the effect that the said agreement did not constitute the trustee, Wheat, a partner of the firm of Edwards and Conant. Nor did the court err in refusing to give the two instructions asked by the plaintiffs, because, though as abstract propositions of law they were unexceptionable, yet as mere abstractions they were irrelevant and calculated to mislead the jury, since the inquiry was not whether a dormant partner was liable in the one case, or a trustee who trades with the trust fund is liable in the other, but whether the party in any character was a partner, either *inter se* or as to third persons.

I am of opinion, therefore, to affirm the judgment, with costs and damages to the appellees.

The other judges concurred.

Judgment affirmed.

PERSONS MAY BE LIABLE TO THIRD PERSONS AS PARTNERS, by holding themselves out as such, although not liable as between themselves: *Jacobs v. Shorey*, 97 Am. Dec. 586, and note 592.

ESSENCE OF CONTRACT OF PARTNERSHIP IS JOINT CONCERN IN PROFITS AND LOSSES: *Bromley v. Elliot*, 75 Am. Dec. 182, and extended note 193.

PERSON WHO HAS NOT AGREED TO BE PARTNER, NOR HELD HIMSELF OUT AS SUCH, is yet liable as partner to third persons, if by the agreement under which the business is carried on he has an interest in a certain share of the profits as profits, and a lien on the whole profits as security for his share: *Pratt v. Langdon*, 93 Am. Dec. 61.

THE PRINCIPAL CASE IS CITED to the point that if the persons merely occupy the relation of principal and agent, employer or employee or factor, no partnership can be predicated upon the fact that such agent, employee, or factor receives a part or share of the profits for his services or other benefits conferred, in *Sodiker v. Applegate*, 24 W. Va. 415; and is cited and approved as to the definition of a partnership in *Setzer v. Beale*, 19 Id. 287.

PHARES v. STATE.

[8 WEST VIRGINIA, 567.]

PERSON LEGALLY ELECTED, AND WHO HAS DULY QUALIFIED AS SHERIFF OF COUNTY, HAS VESTED RIGHT in the office, of which he cannot be deprived but for cause, by due process of law. The fact that his name was stricken from the list of registered voters, after his election and induction into the office, is not alone sufficient cause to deprive him of it.

IT IS ERROR TO ADMIT AS EVIDENCE CERTIFIED LIST OF VOTERS, ordered by the board of registration to be stricken from the list of registered voters. Only the record, or a copy thereof properly certified to be a copy, is so admissible.

REVERSAL OF JUDGMENT REMOVING OFFICER FROM OFFICE REMOVES the only impediment to his office, and an order that he be restored thereto is not necessary.

THE opinion states the case.

C. S. Lewis, for the plaintiff in error.

Caldwell, attorney-general, for the state.

By Court, BROWN, President. This was a rule from the circuit court upon the defendant, Phares, to show cause why he should not be removed from his office of sheriff of Randolph County, because his name had been stricken from the list of registered voters by the board of registration.

There was a motion to quash the rule, which the court overruled.

The only proof in the case that the defendant was not a voter is the certificate of the clerk of the board of registration that certain names, a long list of which he gave, including the name of the defendant, Phares, were ordered by the said board to be stricken from the list of registered voters. This evidence was objected to, but the objection was overruled by the court, and exception taken to the ruling.

A person legally elected to the office of sheriff under the constitution and laws of this state, and having been duly qualified and entered upon the duties of his office, has a vested right in the office, with the privileges and immunities of value, of which he cannot be deprived but for cause, and that by due process of law.

The court erred in refusing to quash the rule on the motion of the sheriff, and also erred in admitting the clerk's certificate of the list of names which he certified to have been ordered by the board of registration to be struck from the list of registered voters. Only the record or a copy thereof, prop-

erly certified to be a copy, was admissible as evidence. But the most material and important error in the case was in depriving an officer of his office, because of the fact alleged, to wit, that his name had, by order of the board of registration, been stricken from the list of registered voters of the county, even if the fact had been legally made to appear.

The constitution prescribes who are entitled to vote, and it also provides that any person so entitled to vote shall be eligible to office. The defendant possessed all the qualifications required by the constitution and laws to vote and hold office at the time he was elected and qualified as sheriff for Randolph County. He had, therefore, a vested right in his office of sheriff, of which he could not be deprived but for cause, by true process of law: Article 2, section 6, of constitution. And whether the board of registration struck his name off the registered list of voters or not, it was wholly immaterial to the rights of the party and the issue to be determined in the case. It never was in contemplation of the convention that framed the constitution, nor of the people when they adopted it, that all the officers of the state, executive, judicial, and ministerial, were to be dependent on the discretion or caprices, as it is claimed, of an irresponsible board of registration in relation to an incidental matter. Suppose that board strikes off the name of a voter one week, and restores it the next, as was done in the defendant's case, and may, under the pretensions set up in this case, repeat the operation every week in the year, and every year without end and without restraint. And, according to the doctrine claimed, the office is forfeited without fault of the officer, and he removed and another appointed as oft as the kaleidoscope changes. The removal of an officer of state from one county to another, or even from one township to another, would secure his being struck from the list of registered voters, and he could not be registered in the new residence until he had remained there the prescribed length of time requisite to vote there. And the consequence would be, according to the pretension, that at every such removal the officer forfeits his office, and must be removed and another appointed.

For the errors above stated, I think the judgment should be reversed and the rule quashed.

It has been suggested whether it is or not necessary that this court should order the party so removed from his office to be restored, but that is not necessary; the reversal of the

judgment on a motion removes the only impediment to his office, and he is in law the only lawful holder of the office of which he was possessed by his election and qualification. The orders of the court vacating the office and appointing another are in effect nullities, and cannot interpose any legal obstruction to the right of the defendant to hold his said office, and exercise all the rights and privileges thereof: *State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 545; *State ex rel. Attorney-General v. Churchill*, 41 Id. 41.

The other judges concurred.

Judgment reversed.

OFFICE, WHAT IS: *Shelby v. Alcorn*, 72 Am. Dec. 163, and extended note 179.

PERSONS ELECTED TO OFFICE WHO HAVE FAILED TO QUALIFY, OR TO ASSUME IN ANY WAY FUNCTIONS OF OFFICE, are in no sense either officers *de jure* or *de facto*: *State v. Beloit*, 91 Am. Dec. 474.

OFFICER WHO BY HIS VOLUNTARY ACT PERMANENTLY DISABLES HIMSELF TO PERFORM the duties of his office thereby constructively resigns the office by abandonment of it: *State v. Allen*, 83 Am. Dec. 367, and see extended note on forfeiture of title to office, 372.

THE PRINCIPAL CASE IS CITED to the point that where the law requires a certain document or record to be kept by a public officer as a memorial of a fact, such document or record is the best evidence of the fact, in *Battin v. Woods*, 27 W. Va. 64.

CAPEHART v. RANKIN.

[3 WEST VIRGINIA, 571.]

GENERAL RULE IS, THAT COURTS WILL NOT AID PARTIES TO ILLEGAL CONTRACTS, which are executory only, to recover thereon. And where the contract is executed, a court will not aid a *particeps criminis* in setting it aside.

CONTRACT VOID AS CONTRARY TO ACTS OF CONGRESS. — An officer in the United States army agreed to pay a soldier a sum of money per month, in addition to his government pay, as a leader of a band of music. The members of the band were all privates in the United States army, and were employed by the officer as a band at his headquarters. In an action by the leader of the band to recover the additional sum per month, it was *held*, that the contract was in direct violation of the policy of the acts of Congress, and that no action could be maintained thereon.

ACTION of *assumpsit*. The facts appear in the opinion. The verdict was for the plaintiff, and the court gave judgment thereon.

J. S. Wheat, for the plaintiff in error.

N. Richardson, for the defendant in error.

By Court, MAXWELL, J. The bill of exceptions shows that Capehart, who was at that time colonel commanding a regiment of West Virginia cavalry in the service of the United States, made a contract with Rankin, by which Rankin was to organize a band for the said regiment, of which he was to be the leader, and for which he was to be paid by Capehart one hundred dollars over and above any pay, emoluments, and bounties to which he might become entitled from the government. Rankin and eleven or twelve other men were accordingly enlisted into the service of the United States as volunteers, credited to the borough of Washington, Pennsylvania, and each received the sum of five hundred dollars, the bounty offered by that borough. After their enlistment, the said Rankin and the men enlisted with him were sent by the order of the mustering officer to the camp of dismounted men, near Hagerstown, Maryland, where they all remained for about three months, when they were sent to the regiment commanded by the said Capehart, and there remained for some time, the said Rankin discharging, while there, his duty as leader of the band. Rankin and his men remained in the service until about the 1st of June, 1865, when they were discharged.

At the time this enlistment took place, and while the men remained enlisted, there was no law in force under which men could be enlisted or detailed for regimental bands, but a law which had before that time been in force for that purpose had been repealed. The effect of the contract was to place about the headquarters of Capehart a number of men, not only not authorized, but forbidden by law, fed, clothed, and paid at the expense of the government, as the leader of whom Rankin was to receive from Capehart, in addition to his government pay, one hundred dollars per month. Under these circumstances, can Rankin recover from Capehart what he promised to pay?

Comyn on Contracts, page 80, says: "All contracts or agreements which have for their effect anything which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void."

It is a general rule that no court will aid a party to an illegal contract, which is executory only, to recover thereon. And where the contract is executed, a court will not aid a *particeps criminis* in setting it aside: *Nellis v. Clark*, 4 Hill,

424; *Gray v. Hook*, 4 N. Y. 449; *Mosely v. Mosely*, 15 Id. 834; *Brown v. Wylie*, 2 W. Va. 502.

I think the contract was in direct violation of the policy of the act of Congress, and cannot be enforced in a court.

The judgment complained of, therefore, will have to be reversed, with costs, the verdict of the jury set aside, and the cause remanded for a new trial.

The other judges concurred.

Judgment reversed.

CONTRACTS THAT CONTRAVENE LAW ARE VOID, and courts will never lend their aid to enforce them: *Tatum v. Kelley*, 94 Am. Dec. 717, and see cases collected in note 719; *Chancely v. Bailey*, 95 Id. 350; *Parsons v. Trask*, 66 Id. 502, and note 510.

ILLEGAL CONTRACTS, RIGHTS OF PARTIES TO: *Tracy v. Talmage*, 67 Am. Dec. 132, and extended note 153.

THE PRINCIPAL CASE IS CITED in *Kanawha Valley Bank v. Wilson*, 25 W. Va. 261, to the point that the law leaves the parties to a contract which began with the corruption of a public officer, and progressed in the practice of known willful deception in its execution, as it found them; if either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud.

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must be such as must reasonably be presumed to have been granted, and not one the exercise of which would destroy the usufruct of the grantor's property. *Id.*

AGENCY.

1. IT IS DUTY OF PERSONS DEALING WITH SPECIAL AGENT TO ASCERTAIN the extent of his authority, and the principal is not bound by any act of the agent not warranted expressly by, or fairly and necessarily implied from, the terms of the authority delegated to him. *Lister v. Allen*, 78.
2. THIRD PERSONS DEALING WITH AGENT IN GOOD FAITH ARE NOT BOUND by the limitations placed on the agent's authority by the private instructions of the principal, which are not known to such third parties, nor properly inferable from the nature of the agent's employment. *Id.*
3. GENERAL AUTHORITY ARISES FROM GENERAL EMPLOYMENT in a specific capacity, such as factor, broker, attorney, etc. Such authority empowers the agent to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or direction not known to the party dealing with the agent. *Id.*
4. PRINCIPAL WILL BE BOUND BY ACTS OF AGENT, although a mere special agent, whom he clothes with all the apparent muniments of an absolute title to the property in himself. *Id.*
5. AGENTS, PARTNERS, OR ASSOCIATES cannot make profit out of their principal, copartner, or co-associate for whom they have undertaken to act. *Simons v. Vulcan Oil & M. Co.*, 628.
6. AGENT OR OTHER PERSON ACTING IN FIDUCIARY CAPACITY cannot speculate for his gain, and to the prejudice of his principal, in the subject-matter committed to his care. *Granley v. Webb*, 304.
7. ONE WHO UNDERTAKES TO COLLECT RENTS AND EXERCISE CONTROL OVER PROPERTY occupies a fiduciary relation which forbids his placing himself in antagonism to his principal with respect to such property. *Id.*
8. PARTIES WHO ACT AS AGENTS FOR CORPORATION to be formed, in acquiring property cannot charge a profit as against their principal, nor can they charge a profit if they assume to act without precedent authority, if their transactions are accepted as the acts of agents by the corporation, and if, in order to create the corporation, they represent themselves as acting for the company to be formed, and propose to sell at the prices they pay, and their purchases are taken on such representations, and stockholders invest thereon; it is fraud on the company and interested parties to allow such agents to retain profits paid them in ignorance of the true sums actually advanced in making purchases. *Simons v. Vulcan Oil & M. Co.*, 628.
9. IN ACTION AGAINST AGENTS to recover profits made by them from the purchase of property for a corporation, to be created afterwards, a prospectus, advertisement, and receipt issued by one is material evidence against all the agents, provided the purchase and sale was the combined act of all of them. *Id.*
10. WHEN AGENTS BUY LANDS FOR CORPORATION to be formed, and disclose the exact price paid, and refuse to sell for less than the sum asked, they may retain the profit made; but when they represent to sell at cost, and through concealment and misrepresentation reap a profit, they cannot retain it. *Id.*
11. IN ACTION AGAINST AGENTS TO RECOVER PROFITS made illegally from the sale of land for a corporation to be formed, actual receipt of money by all must be proved to make all liable. *Id.*

12. RECEIPT OF MONEY BY AGENT IS PRIMA FACIE EVIDENCE of its receipt by the principal; and its receipt by a partner is *prima facie* evidence that it was received for the benefit and use of the firm. *Id.*
13. REPRESENTATIONS OR DECLARATIONS OF AGENT DO NOT BIND PRINCIPAL, unless made at the time of the contract. They constitute no part of the *res gesta* if made after the contract is consummated, and are not admissible in evidence against the principal. *Smith v. Cooke*, 58.
14. WHEN PRESIDENT OF RAILROAD COMPANY SIGNS IN HIS OWN NAME due-bill for "labor performed on cottage lot of railroad company," parol evidence is admissible to ascertain whether the work was performed for the president or for the company. *Richmond etc. R. R. Co. v. Sneed*, 670.
15. SALE OF STOLEN PROPERTY BY AGENT for benefit of principal, both being innocent of the fact that the property was stolen, amounts to conversion by the agent, and makes him liable to the owner. *Koch v. Branch*, 324.
16. SALE OF STOLEN PROPERTY OF ANOTHER BY AGENT for the benefit of his principal evidences conversion; and to make the agent liable, it is not necessary that he use the proceeds for his own benefit. *Id.*
17. RENEWAL OF LEASE given to the agent or trustee of the holder of the original lease is held for the benefit of the latter, who may compel its assignment to him, and an accounting for the profits received therefrom. *Grumley v. Webb*, 304.
18. POWER OF ATTORNEY EMPOWERING ATTORNEY, AMONG OTHER THINGS, "TO BUY AND SELL REAL ESTATE, and in my name to receive and execute all necessary contracts and conveyances therefor," does not authorize such attorney to sell and convey lands to which, as the proper record shows, the principal has acquired title before the execution of the power. Such power is to be construed as having reference to a business to be inaugurated after its execution. *Greve v. Coffin*, 229.

See CORPORATIONS, 11, 12.

ALIENS.

See CRIMINAL LAW, 1.

ALTERATION OF INSTRUMENTS.

See NEGOTIABLE INSTRUMENTS, 8, 9.

ARREST.

- UTMOST GOOD FAITH AND FIRMEST BELIEF THAT PERSON HAS STOLEN GOODS, AND SECRETED THEM about his person, will not justify the owner of the goods in arresting, detaining, and searching, by the aid of a policeman, the suspected person; and in an action for damages therefor, good faith is only material on the question of damages. *Malt v. Lord*, 448.

See CRIMINAL LAW, 9, 10, 15-22.

ASSIGNMENTS.

1. ASSIGNMENT OF BOND AND MORTGAGE CARRIES WITH IT GUARANTY OF SAME, although the guaranty is not in terms assigned. The transfer of a debt carries with it, as an incident, all the securities for its payment. *Craig v. Parks*, 469.
2. BILL OF EXCHANGE DRAWN ON DEBTOR does not of itself operate as an assignment in equity of the debt, even if negotiated for a good considera-

tion. It is evidence tending to show such assignment, and, with other circumstances to show that such was the intention of the drawer, will vest in the holder an exclusive claim to the indebtedness. *Bank of Commerce v. Bogy*, 247.

3. ORDER FOUNDED ON GOOD CONSIDERATION given for a specific debt or fund owing by or in the hands of a third person, operates as, or rather is evidence of, an equitable assignment of the demand to the holder, so that he may sue and recover the debt or fund, whether the order be accepted or not. *Id.*
4. ANYTHING SHOWING INTENTION ON ONE SIDE to make a present irrevocable transfer of the fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment, if supported by sufficient consideration. *Id.*
5. UNACCEPTED BILL OF EXCHANGE DOES NOT of itself give the holder any interest in the fund or property against which it is drawn. *Id.*
6. ORDER SHOULD BE TREATED AS EVIDENCE of equitable assignment, when it is given for the exact amount of money in the hands of the drawee upon full consideration, received at the time, with no circumstances indicating any remaining interest in the drawer. *Id.*

See AGENCY, 17; INSURANCE, 3.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See CORPORATIONS, 22.

ASSAULT AND BATTERY.

1. WHERE PARTIES JOINTLY ENGAGE IN UNLAWFUL ACT, they are jointly or severally liable from injury to a third party resulting therefrom, if caused by any of the parties to the unlawful act; therefore, where parties engage in mutual combat with pistols in a street, and an innocent passer-by is injured, all of the combatants are liable. *Murphy v. Wilson*, 290.
2. WHERE INJURY RESULTS TO INNOCENT THIRD PERSON from a mutual combat between parties, the latter are all principals, and all liable, either jointly or severally. *Id.*

See CORPORATIONS, 9.

ATTACHMENTS.

1. ATTACHMENT AFFECTS ALL PROPERTY AND CREDITS OF DEBTOR IN HANDS OF GARNISHEE, or which may come to his hands at any time after laying the attachment, and before trial. *First National Bank of Baltimore v. Jagers*, 53.
2. AFFIDAVIT WHICH STATES IN ALTERNATIVE TWO SEPARATE GROUNDS OF ATTACHMENT is bad, and an attachment issued thereon will be set aside. And an affidavit that avers that the defendant "has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, his property, with intent to delay or defraud his creditors," states two separate grounds in the alternative. *Guile v. McNanny*, 244.

See BANKRUPTCY AND INSOLVENCY.

ATTORNEY AND CLIENT.

1. PAYMENT OF JUDGMENT OR DECREE TO ATTORNEY OF RECORD WHO OBTAINED IT, before his authority is revoked, and due notice of such revo-

cation given to the defendant, is valid and binding on the plaintiff, so far, at least, as the defendant is concerned. *Yakow v. Tilden*, 738.

2. IT DEVOLVES UPON PLAINTIFF WHO SEEKS TO COMPEL DEFENDANT TO PAY OVER AGAIN MONEY paid to the plaintiff's attorney, upon the judgment or decree obtained by such attorney, to show that the defendant had notice of the revocation of the attorney's authority to receive the money, before it was paid to him. *Id.*

See AGENCY, 3.

AUCTIONS.

PURCHASER AT AUCTION SALE UNDER DEED OF TRUST IS NOT BOUND by a memorandum of the sale made by the trustee, who was his own auctioneer at the sale. *Tull v. Davis*, 385.

BAILMENTS.

FACT THAT ONE TAKES POSSESSION OF STOLEN PROPERTY, as depositary or common carrier, will not charge him with conversion, but some action by which it is converted into something else, as into money or other property, either by sale, exchange, or collection, or some intermeddling inconsistent with the owner's right should be found, in order to make the person responsible who has obtained innocent possession. *Koch v. Branch*, 324.

BANKRUPTCY AND INSOLVENCY.

FOURTEENTH SECTION OF UNITED STATES BANKRUPT ACT OF MARCH 2, 1867, REFERS to writs of attachment when used as means and not as final process. *First Nat. Bank of Baltimore v. Jagers*, 53.

See LANDLORD AND TENANT, 1.

BANKS AND BANKING.

1. MONEY PAID TO HOLDER OF CHECK OR DRAFT DRAWN WITHOUT FUNDS may be recovered back, if paid by the drawee under a mistake of fact. *Merchants' Nat. Bank v. National Eagle Bank*, 120.
2. RULE OF CLEARING-HOUSE DOES NOT WORK FORFEITURE OF MONEY PAID ON CHECK WHEN. — The rule of a clearing-house association that a bad check is to be returned by the bank receiving it to the bank from which it was received, and in no case to be held after one o'clock, simply fixes a time at which payment of the check is to be considered complete; and a failure to return such a check by that time does not work a forfeiture of the money paid on it. *Id.*
3. WHERE BANK CHARTER AUTHORIZES BOARD OF DIRECTORS TO MAKE RULES REGULATING TRANSFER OF STOCK, a by-law adopted by them, forbidding the transfer of stock so long as the owner is indebted to the corporation, is valid, although inconsistent with the general law of the state governing the transfer of property. *Mechanics' Bank v. Merchants' Bank*, 383.

See INJUNCTIONS, 3; NEGOTIABLE INSTRUMENTS, 5, 7, 10, 11.

BILLS OF LADING.

See COMMON CARRIERS.

BONA FIDE PURCHASERS

1. NOTICE TO PURCHASER OF EQUITABLE INTEREST need not come from the party interested, or his agent, for it is sufficient if it comes *aliunde*, provided it is of a character likely to gain credit. *Butcher v. Yocum*, 625.
2. WHERE WIDOW ATTEMPTS TO CONVEY EQUITABLE INTEREST OF HEIR, his grandfather is a proper person to give notice of such equitable interest to the purchaser. *Id.*

BONDS.

BONDS HAVING ATTACHED COUPONS, FOR SEVERAL YEARS OVERDUE AND UNPAID, are dishonored on their face, and a purchaser thereof takes them subject to all equities. The interest on such bonds, equally with the principal, is a part of the debt which they were intended to evidence, and it is not material whether the whole or only a part of the debt was overdue. *First National Bank of St. Paul v. County Commissioners of Scott County*, 194.

See ASSIGNMENTS, 1; OFFICE AND OFFICERS, 4.

BOUNDARIES.

CALL FOR BOUNDARY IN DEED OF PARTITION WAS "from the base of the hill to the back line of the survey, such course as will throw five hundred acres of said tract of one thousand acres below said division line": held, that as natural objects and fixed lines control magnetic calls and distances, the call for the "back line" would control the case for quantity, and that the line from the given point to the "back line" must be a straight one. *Tompkins v. Vintrose*, 735.

See HIGHWAYS; PUBLIC LANDS, 4, 5; WATERS.

BROKERS.

See AGENCY.

CERTIORARI.

1. WRIT OF CERTIORARI ISSUES ONLY TO INFERIOR COURTS, and to review only judicial action. *Saline County Subscription, In re*, 337.
2. ACTION OF COUNTY COURT IN SUBSCRIBING TO RAILROAD STOCK AND ISSUING BONDS FOR PAYMENT THEREOF is a discretionary and not a judicial proceeding, and is not the subject of review by writ of certiorari. *Id.*

CHECKS.

See BANKS AND BANKING; NEGOTIABLE INSTRUMENTS.

COMMON CARRIERS.

1. COMMON CARRIER BY RAILWAY must transport goods to the place of destination, and deposit them without delay or additional charge in his warehouse until the owner or consignee has reasonable time to remove them. He is not required to deliver at the door or place of business of the consignee, or to give notice of their arrival. *Shank v. Philadelphia Steam P. Co.*, 644.
2. COMMON CARRIER'S RESPONSIBILITY LASTS UNTIL DELIVERY to the owner or consignee, or until that of some other party begins. But he may be both a carrier and a warehouseman, and he ceases to be the former when

- he has placed the goods in the warehouse, after which he is only liable for ordinary neglect. *Id.*
2. CARRIER BY WATER MUST GIVE NOTICE to consignee of arrival of the goods. *Id.*
 4. COMMON CARRIER MUST TAKE CARE, at his peril, that the goods are delivered to the right person; a delivery to the wrong person renders him clearly liable for loss, for which trover will lie. *Id.*
 5. CARRIER MUST BE ABLE TO SHOW that the party to whom the goods were delivered as agent was authorized as such by the owner or consignee to receive them; otherwise, he is liable for their loss. *Id.*
 6. WHERE GOODS HAVE BEEN CARRIED BY WATER and landed at the wharf, the carrier is still liable as bailee, unless he can show that they have been lost without negligence on his part, or that of his agents or servants. *Id.*
 7. NON-DELIVERY BY CARRIER IS PRIMA FACIE PROOF of want of ordinary care, and casts the burden of proof on him. *Id.*
 8. WHAT NOT EVIDENCE to DISCHARGE CARRIER. — Acceptance by one man of goods from a drayman is no evidence to constitute such drayman his agent so as to charge him with goods which the drayman received to deliver, but lost by the way. *Id.*
 9. BILL OF LADING HAS ATTRIBUTE OF NEGOTIABILITY in a qualified and restricted sense, and may be transferred by indorsement and delivery. *Davenport National Bank v. Homeyer*, 363.
 10. DELIVERY OF BILL OF LADING FOR VALUE, THOUGH UNINDORSED, CARRIES WITH IT the property in the goods covered thereby, as against the consignor's factor, though a consignee is named therein; and this is so, although the consignor was indebted to his factor for advances made on account of prior shipments. *Id.*
 11. BILL OF LADING REPRESENTS PROPERTY THEREIN DESCRIBED, and a delivery of the bill is treated as a symbolical delivery of the property. *Id.*
- See BAILMENTS; SHIPPING.

CONTEMPTS.

1. WITNESSES ON PROCEEDINGS SUPPLEMENTARY TO EXECUTION UNDER NEW YORK CODE ARE BOUND TO ANSWER ALL QUESTIONS concerning transfers of property by the judgment debtor, and particularly as to transfers made to the witnesses, and any questions seeking information as to whether such transfers were honest or fraudulent, and upon refusal to do so, may be punished as for contempt. *Lathrop v. Olapp*, 493.
2. ORDER TO PUNISH WITNESS AS FOR CONTEMPT, IN REFUSING TO ANSWER IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION before a referee, may be made under section 302 of the New York code, by a judge out of court. *Murray, J., contra. Id.*

CONTRACTS.

1. TO EXEMPT CONTRACTING PARTY FROM PERSONAL RESPONSIBILITY, HE MUST SO CONTRACT as to bind those he claims to represent; and the fact that he describes himself as "trustee" in signing the contract does not relieve him, or change the effect of his agreement. *Pumpelly v. Phelps*, 463.
2. EXECUTORY CONTRACT IN WRITING NOT UNDER SEAL MAY, before breach, be varied by parol, either by enlarging the time, changing the mode of

payment, or by putting an end to it altogether. But the new contract, if executory, must be founded upon a new consideration. *Pratt v. Morrow*, 381.

3. AS GENERAL RULE, SEALED INSTRUMENT CANNOT BE VARIED or abrogated by another agreement, unless the latter is also sealed. *Id.*
4. CONTRACT BY PAROL WHICH INCLUDES an unsealed writing needs a consideration to support it. *Crawford's Appeal*, 609.
5. ENTIRETY OF CONTRACT DEPENDS upon the intention of the parties, and not on the divisibility of the subject. Nor will the mode of measuring the price change the effect of the contract when it is entire. *Shinn v. Bodine*, 560.
6. CONTRACT TO DELIVER CERTAIN AMOUNT OF COAL, at a stated price per ton, the coal to be delivered on board vessels sent for it during certain months, and if not so delivered, a certain amount of the coal to be delivered later, is an entire contract, and payment cannot be demanded on delivery of each vessel-load, nor the contract rescinded for refusal to pay in such mode before the contract is entirely fulfilled. *Id.*
7. GENERAL RULE IS, THAT COURTS WILL NOT AID PARTIES TO ILLEGAL CONTRACTS, which are executory only, to recover thereon. And where the contract is executed, a court will not aid a *particeps criminis* in setting it aside. *Capehart v. Rankin*, 799.
8. CONTRACT VOID AS CONTRARY TO ACTS OF CONGRESS. — An officer in the United States army agreed to pay a soldier a sum of money per month, in addition to his government pay, as a leader of a band of music. The members of the band were all privates in the United States army, and were employed by the officer as a band at his headquarters. In an action by the leader of the band to recover the additional sum per month, it was held, that the contract was in direct violation of the policy of the acts of Congress, and that no action could be maintained thereon. *Id.*
9. AGREEMENT IN RESTRAINT OF TRADE must be established by clear and satisfactory proof, in order to justify a court in restraining its breach by injunction. There must be no doubt or uncertainty in regard to its terms, or the consideration upon which it is founded. *Hall's Appeal*, 584.
10. CONTRACT IN WRITING MUST SPEAK FOR ITSELF, unless it is clearly shown that a stipulation was omitted through fraud or mistake. *Id.*
11. WHEN ONE SELLS GOOD-WILL OF HIS BUSINESS for a valuable consideration, good faith requires that he do nothing which directly deprives the vendee of its benefits and advantages. If he holds himself out to the public by advertisement or otherwise as continuing his former business, or as carrying it on at another place, he may be enjoined from so doing. *Id.*
12. CONTRACT IS VOID AS AGAINST PUBLIC POLICY, AND WILL NOT BE ENFORCED, where the consideration is, that one of the parties thereto would give "all the aid in his power, spend such reasonable time as may be necessary, and generally use his utmost influence and exertions to procure the passage into a law" of a bill introduced into the legislature. *Mills v. Mills*, 535.
13. BILL IN EQUITY WILL NOT LIE IN FAVOR OF MAKER TO COMPEL SURRENDER OR CANCELLATION OF OVERDUE PROMISSORY NOTE, and mortgage given to secure its payment, on the ground that the consideration for the note and mortgage was a promise of the payee to forbear to prosecute for an embezzlement. The law leaves the parties to an illegal contract exactly where it finds them. *Atwood v. Fisk*, *Currant v. Fisk*, 124.

14. DEMAND MADE ON SUNDAY FOR DELIVERY OF WHEAT under a contract is a nullity, and cannot be validated by any act of the party upon whom it was made. *Brackett v. Edgerton*, 211.
15. RESCISSION OF EXECUTED CONTRACT ON GROUND OF FRAUD, failure of consideration, and the like, is a right in equity, subject to a restoration of the consideration. In such case, the party seeking equity must do equity; he must return the property obtained, or reconvey the title, and a failure in this particular will be followed by a denial of equity. But if the thing the consideration for which is sought to be recovered is entirely worthless, there is no duty to return it, in order to entitle plaintiff to recover. *Babcock v. Case*, 654.

See USAGES AND CUSTOMS; WAR.

CORPORATIONS.

1. CORPORATION CANNOT BE CREATED BY MERE ACQUIESCENCE, but only by positive act of legislation, or by some power thereto authorized by a legislative act. *Washington etc. R. R. Co. v. Alexandria etc. R. R. Co.*, 710.
2. EVERY REASONABLE INTENDMENT IS MADE in favor of the acts of a private corporation. They are presumed regular until the contrary appears. *State v. Kupferle*, 265.
3. PARTY IN POSSESSION OF OFFICE IN PRIVATE CORPORATION is presumed regularly elected, and entitled to hold until the contrary is shown. *Id.*
4. PROCEEDINGS OF BOARD OF DE FACTO DIRECTORS OF PRIVATE CORPORATION are presumed regular until irregularity is shown; therefore, when, acting under a by-law, they remove an officer, it will be presumed that they acted on sufficient grounds, until their action is impeached by proof. *Id.*
5. DIRECTORS ARE BUT AGENTS AND TRUSTEES OF CORPORATION; they have power only to act for the interest of the company, not against it. *Simons v. Vulcan Oil & M. Co.*, 628.
6. SHARE-HOLDERS CONSTITUTE CORPORATION HAVING STOCK, and not the directors. The acts of the latter may be inquired into by the former. *Id.*
7. FRAUD PERPETRATED AGAINST CORPORATION by any or all of the directors may be redressed by an action in the name of the corporation. *Id.*
8. STOCKHOLDERS IN CORPORATION WHICH IS DEFENDANT TO SUIT IN EQUITY, SEEKING TO HAVE IT DECLARED NULL, are not proper parties to defend the suit, but may be admitted as parties defendant to protect equitable interests claimed by them in the property, in case the corporation is annulled. *Washington etc. R. R. Co. v. Alexandria etc. R. R. Co.*, 710.
9. CORPORATIONS ARE NOT ANSWERABLE FOR ASSAULTS and batteries, riots, larcenies, and the like. *Delaware Division Canal Co. v. Commonwealth*, 570.
10. CORPORATIONS ARE HELD TO SAME LIABILITY AS INDIVIDUALS, and if an agent or servant of a corporation, in the line of his employment, be guilty of negligence or commit a wrong, the corporation is responsible in damages. *Hildorf v. City of St. Louis*, 352.
11. AUTHORITY OF PRESIDENT OF RAILROAD COMPANY TO MAKE CONTRACTS for necessary labor for the company is incident to his office, and he may furnish evidence of the amount payable under the contract, either before or after the performance of the service, and put that evidence, in his discretion, into the form of a due-bill or promissory note, unless his authority is restricted by special legislation, or by regulations of the company

- known to the other contracting party. *Richmond etc. R. R. Co. v. Seaf,* 670.
12. FACT THAT PRESIDENT OF RAILROAD COMPANY USUALLY GAVE NOTES of the company on printed forms, and signed them as president, will not prevent a recovery against the company upon a due-bill, not upon a printed form, and not signed as president, but is a mere circumstance to be weighed by the jury in determining whether or not the consideration passed to the company so as to make them liable. *Id.*
 13. PURCHASER OF CORPORATE STOCK, AT SALE UNDER EXECUTION, ACQUIRES NO TITLE THERETO, if the defendant in the execution had none, nor will he acquire any greater or other rights than the seller had. *Mechanics' Bank v. Merchants' Bank,* 388.
 14. POWER OF CORPORATION TO FORFEIT STOCK given it by charter must be strictly pursued, and if any restrictions or limitations provided have been disregarded, the forfeiture is invalid. *Germantown Passenger R. R. Co. v. Fuller,* 546.
 15. SUBSCRIBER TO STOCK AND MEMBER OF CORPORATION must be presumed to know the terms of his subscription. *Id.*
 16. IF CORPORATION FOLLOWS PROVISIONS OF ITS CHARTER relating to the forfeiture of stock, its right to forfeit it at the end of the time limited is perfect, and a stockholder who is in default can claim no further delay or any other notice than that prescribed and given. *Id.*
 17. ENTIRE CAPITAL STOCK OF CORPORATION is a trust fund for the payment of its debts. *Id.*
 18. UNPAID SUBSCRIPTIONS TO STOCK OF CORPORATION are part of its assets which are available in equity to creditors, and a general assignment for their benefit passes them to the assignee. *Id.*
 19. ASSIGNEE OF CORPORATION MUST BE ABLE TO SHOW that calls for unpaid capital stock have been duly made, and by proper authority, as he can only proceed in the name of the corporation, and must show that the provisions of the charter have been pursued. *Id.*
 20. EQUITY WILL COMPEL DIRECTORS OF CORPORATION to make calls for unpaid capital stock as required by the charter, whenever aid is invoked by creditors or their representatives. *Id.*
 21. INTERVENTION OF EQUITY FOR BENEFIT OF CREDITORS becomes indispensable when corporations cease to keep up their organization and abandon all action under their charter. *Id.*
 22. CORPORATION IS NOT NECESSARILY DISSOLVED BY INSOLVENCY, assignment for the benefit of creditors, or writ of sequestration. If it keeps up its organization, it still exists, and its franchises and powers not capable of assignment must be exercised by it in subserviency to its legal and equitable obligations. *Id.*
 23. WHEN DEBTS OF CORPORATION REQUIRE IT TO MAKE CALLS for unpaid capital stock, it is its duty to make them as much as it is to collect other debts due it; its discretion in the matter relates only to the time and manner of making them. *Id.*
 24. FORFEITURE OF STOCK OF CORPORATION extinguishes all rights and liabilities of the share-holder and of the corporation to recover on it; and its creditors, by whom the money is needed, can object and invoke equity to prevent it or set it aside. *Id.*
 25. POWER TO MAKE CALLS FOR UNPAID STOCK in corporation is vested in its directors, and no one can object to its lawful exercise, except creditors or their representatives. *Id.*

26. WHERE SHARE-HOLDERS OBJECT TO PAYMENT of their subscriptions under calls for unpaid stock to the treasurer of the corporations, they must tender the amount to its assignee; and if he refuses it, they would then be entitled in equity to be relieved from any attempted forfeiture. *Id.*
 27. WHERE MAYOR HAS NO POWER TO CONTRACT FOR REMOVAL OF DEAD ANIMALS FROM CITY, the city cannot be held liable for damages caused by the deposit of the carcasses upon private premises by a party who had agreed with the mayor to remove them. *Hilendorf v. City of St. Louis*, 353.
 28. FACT THAT MUNICIPAL CORPORATION HAS MADE CONTRACT WITH CERTAIN PERSONS FOR REMOVAL OF CARCASSES of all dead animals does not exonerate the owner from any responsibility regarding the removal of such nuisances, when such contract cannot or is not complied with. *Id.*
 29. CORPORATIONS OTHER THAN MUNICIPAL MAY BE INDICTED, and are amenable to the criminal law for the creation and maintenance of a public nuisance; but for other misfeasances they are not generally indictable. *Delaware Division Canal Co. v. Commonwealth*, 570.
- See AGENCY, 8-11, 14; BANKS AND BANKING; NUISANCE; RAILROADS; TAXATION, 4.

CO-TENANCY.

1. EVERY TENANT IN COMMON IS ENTITLED TO POSSESS, USE, AND ENJOY the common property, without accountability to his co-tenants for rents or profits, except as provided by statute, for so much as he may receive beyond his just share or proportion. *Graham v. Pierce*, 658.
 2. TENANTS IN COMMON ARE NOT BOUND TO USE COMMON PROPERTY JOINTLY, by means of a partnership between them, but may possess, use, and enjoy the common property severally, accounting to their co-tenants for so much of the rents and profits as they may receive beyond their just share and proportion. *Id.*
 3. WHERE TENANT IN COMMON USES COMMON PROPERTY TO EXCLUSION OF HIS CO-TENANTS, or occupies and uses more than his just share or proportion, the best measure of his accountability to his co-tenants is, as a general rule, their shares of a fair rent of the property so occupied and used by him. But peculiar circumstances may exist, making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common, as in the case of a tenancy in common in lead mines; and in such case, in settling the accounts of the occupying and operating tenants, each should be charged with all his receipts and credited with all his expenses, including those for necessary improvements, on account of the operation of the mine. *Id.*
 4. TENANT IN COMMON WHO OCCUPIES AND USES COMMON PROPERTY SEPARATELY CANNOT BE HELD to account to his co-tenants for destruction or waste, unless the bill sufficiently charges it. *Id.*
 5. TENANT IN COMMON OF SINGLE TRACT OF LAND CANNOT, IT SEEMS, AS AGAINST HIS CO-TENANTS, hold or sell part of the tract by metes and bounds, or convey an undivided interest in a specific part only, nor can such part or interest be sold on execution against him; but whether the rule applies where there are several other tracts, held by the same tenancy, in which no interest is sold, is doubtful. *Campbell v. Godfrey*, 133.
 6. GRANTEE OF INTEREST OF TENANT IN COMMON IN PART OF SEVERAL TRACTS OF LAND HELD IN COMMON cannot maintain a bill to set aside a pre-
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- vious execution sale of the tenant's interest in such part, on the ground that the sale of such an interest is invalid; because, if the execution sale is void, the conveyance, for the same reason, is also void; and if the conveyance is valid, the execution sale must also be valid. *Id.*
7. WHERE TENANT IN COMMON IS IN POSSESSION, and by will bequeaths the whole estate, in the presence of his co-tenant, who acts as a subscribing witness to the will, this is an open and unequivocal claim of adverse possession to the whole tract, and amounts to an ouster of the co-tenant. *Miller v. Miller*, 538.
 8. EITHER OF CO-TENANTS MAY REDEEM WHOLE OF JOINT ESTATE from sale thereof on foreclosure; and upon so doing or upon taking an assignment of the certificate, he will be held to do so for the benefit of the whole estate, and will be entitled to reimbursement from his co-tenant of the amount properly chargeable to the share of such co-tenant. *Horton v. Magit*, 222.

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See PARTITION.

COUPONS.

See BONDS.

COURTS.

1. COURT MAY ALWAYS, EVEN AT SUBSEQUENT TERM, and after the case has been finally disposed of, set right mere forms in its judgments, or correct misprisions of its clerks, or any mere clerical errors, so as to conform the record to the truth. *Gibson v. Chouteau*, 366.
2. WHERE COURT HAS OMITTED TO MAKE ORDER, WHICH IT MIGHT OR OUGHT TO HAVE MADE, it cannot at a subsequent term be made *nunc pro tunc*. In all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry. *Id.*

CRIMINAL LAW.

1. CITIZEN OF FOREIGN COUNTRY, OR OF ANOTHER STATE, MAY BE CONVICTED OF MANSLAUGHTER IN MASSACHUSETTS, if he inflicts injuries upon another person upon the high seas, and the latter dies within that commonwealth from the effect of such injuries. *Commonwealth v. Macloon*, 89.
2. ALLEGATION IN INDICTMENT FOR MANSLAUGHTER IS NOT BAD FOR DUPLICITY neither for alleging that death was caused by a wounding, an exposure to cold and inclement weather, and a starving, nor for a failure to state that such acts, or either of them, were mortal, or of a mortal nature. Such indictment will be sustained by proof that death was caused by all or any of such inflicted injuries. *Id.*
3. WORD "INFLECT" DOES NOT NECESSARILY IMPLY DIRECT VIOLENCE. *Id.*
4. WORDS "INFLECTED INJURY" MEAN ANY BODILY HARM which is caused by one to be suffered upon another. *Id.*
5. DEFENDANT CANNOT BE CONVICTED OF MANSLAUGHTER, unless he did all of the acts which occasioned the death, or aided or abetted the doing of such acts. *Id.*
6. CONVICTION MAY BE HAD FOR CAUSING DEATH BY STARVATION OR EXPOSURE, under a statute providing for the punishment of causing death within the state by means of "a mortal wound given, or other violence or injury inflicted." *Id.*
7. ONE WHO DOES CRIMINAL ACT IN ONE COUNTY OR STATE MAY BE HELD LIABLE for its continuous operation in another. *Id.*

8. CRIMINAL HOMICIDE DEFINED. *Id.*

9. WHERE FELONY HAS BEEN COMMITTED AND FRESH PURSUIT IS MADE by a private citizen and the owner of the stolen goods on reliable information of the felony, and the felons when overtaken are informed of the felony, that they are believed to be the perpetrators, and that they must return under arrest, but before either is seized one rids himself of the stolen property, whereupon they kill the pursuer, the killing is murder, and not manslaughter. *Brooks and Orme v. Commonwealth*, 645.

10. WHEN PRIVATE CITIZEN SEEKING TO MAKE ILLEGAL ARREST is killed by the pursued, the crime is not necessarily manslaughter. This depends on whether the killing was without malice, and arose solely from a sudden heat and passion upon the illegal arrest; if it was prompted by wickedness of heart and consciousness of guilt which determined the pursued to escape at the cost of an innocent life, the killing is murder. *Id.*

11. TO REDUCE KILLING TO MANSLAUGHTER, it must be shown that the party doing it was justly provoked and transported by passion, ungovernable, and deaf to the voice of reason, and the cause which produces this frame of mind must be reasonable, and bear a just proportion to the effect. *Id.*

12. TO REDUCE KILLING TO MANSLAUGHTER, all circumstances must lead to the conclusion that the act done, though intentional, was not the result of cool, deliberate judgment and previous malignity of heart, but solely imputable to human infirmity. *Id.*

13. ILLEGAL ASSAULT WILL NOT REDUCE KILLING TO MANSLAUGHTER, when the revenge is disproportionate and barbarous. *Id.*

14. CRUEL AND UNUSUAL BEATING UPON SLIGHT PROVOCATION producing death is murder by express malice, though the killing was not intended, if from the weapon used or circumstances it is shown that great bodily harm was intended. *Id.*

15. UPON COMMISSION OF FELONY, PRIVATE PERSON making fresh pursuit on reliable information may arrest the felon, or on probable suspicion he may arrest the felon or person suspected, but on suspicion of felony merely he cannot break open a house or kill the suspected person. *Id.*

16. PRIVATE PERSON (AND A FORTIORI PEACE OFFICER) present when a felony is committed is bound to arrest the felon on pain of fine and imprisonment if he escapes through negligence, and they may justify breaking open doors; and if they kill him, provided he cannot be otherwise taken, it is justifiable; though if they are killed in trying to make the arrest, it is murder. *Id.*

17. UPON COMMISSION OF FELONY, arrest may be justified by any person without warrant; and if an innocent person is arrested upon suspicion by a private citizen, the arrest is excused if felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed the arrest is illegal, though an officer would be justified if acting upon reliable information from another. *Id.*

18. WHEN FELONY HAS BEEN COMMITTED, or upon probable suspicion, a private person may arrest the felon without warrant, first giving notice of his purpose, but the felony must be proved to justify the arrest. *Id.*

19. LARCENY WILL JUSTIFY ARREST BY PRIVATE CITIZEN. *Id.*

20. WHERE PRIVATE CITIZEN SEEKS TO ARREST an innocent party and is killed, the killing is manslaughter. *Id.*

21. ARRESTS OF JUDGMENT ARISE from intrinsic causes appearing on the face of the record, and in criminal cases are founded on exceptions to the in-

dictment. An exception to this rule exists when pardon is pleaded before sentence. *Delaware Division Canal Co. v. Commonwealth*, 570.

22. IN CIVIL ACTIONS, WHATEVER IS ALLEGED in arrest of judgment must be such matter as would on demurrer be sufficient to overturn the action or plea, and the same rule applies in both civil and criminal cases. *Id.*
23. PROCEEDINGS AND OBJECTS OF ASSEMBLAGES, the provocation thereby to the defendant, and his action in opposition to them, constitute, together, one entire transaction, in a prosecution for homicide, where it appeared that the riotous assembly, resulting in the homicide, grew out of and was directly connected with one that had assembled at the same place the night before, with the same object. *Patten v. People*, 173.
24. PROSECUTION IN TRIAL FOR HOMICIDE HAS NOT ONLY RIGHT, BUT IS UNDER DUTY TO SHOW GENERALLY TRANSACTION, as a whole, surrounding the killing, its nature and its objects, whether tending to show the guilt or innocence of the defendant, where the homicide resulted from certain assemblages and their riotous conduct; and whether the prosecution does this or not, the defendant has a right, either by cross-examination or by his own witnesses, to go fully into the matters thus constituting the *res gestæ*. *Id.*
25. STATEMENTS OF WITNESSES RELATE TO RES GESTÆ, AND THEIR CONTRADICTION IS THEREFORE COMPETENT, where, after having testified for the prosecution, in a trial for homicide, in reference to the proceedings of a riotous assemblage connected with the killing, as a member thereof, denied, on cross-examination, that he had stated to different persons, shortly after, that he was present as a mere looker-on, and took no part in it whatever. *Id.*
26. HOMICIDE IS NOT EXCUSED IN ATTEMPTING TO COMPEL RIOTOUS ASSEMBLAGE about defendant's dwelling-house in the night-time to leave, where no violence had been done or attempted by them against either the house or the inmates. *Id.*
27. CONDUCT OF DEFENDANT TOWARDS RIOTOUS ASSEMBLAGE ABOUT HIS DWELLING-HOUSE IS EXCUSED to the same extent as if the danger thereby to his mother's life had resulted from an actual attack upon her person, or the like danger to the defendant from an attack upon him, where, from his mother's feeble health, the defendant might well have apprehended that her life was endangered by the riotous proceedings, and if the rioters were informed of her condition, or if all reasonable and practicable efforts had been made to notify them of the fact. *Id.*
28. DEFENDANT IS EXCUSABLE IN ACTING ACCORDING TO SURROUNDING CIRCUMSTANCES AS THEY APPEARED TO HIM; and if, from those circumstances, he believed there was imminent danger of death, or great bodily harm to himself or any member of his family, and had tried every other reasonable means which would, under the circumstances, naturally occur to a humane man to repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and if such means resulted in the death of any of the supposed assailants, the homicide is excusable. *Id.*

See CORPORATIONS, 9, 10, 29; NUISANCE; SOVEREIGNTY.

DAMAGES.

1. LEGAL RELIEF OF DAMAGES CANNOT BE AWARDED UNDER CODE, IN ACTION SEEKING FOR EQUITABLE RELIEF ONLY, damages being neither alleged

in the complaint nor claimed upon the trial, where the court finds that the plaintiff is not entitled to equitable relief, but certain facts appear which would warrant an action by the plaintiff for damages. *Bradley v. Aldrich*, 528.

2. **SPECIAL DAMAGES CANNOT BE RECOVERED, UNLESS PARTICULARS BE SET UP.** *Brackett v. Edgerton*, 211.
3. **MEASURE OF DAMAGES IN TORT IS ACTUAL COMPENSATION** for the injury. Whatever ascertains this is proper evidence for the jury. *Seely v. Allen*, 642.
4. **INADVERTENT OR UNINTENTIONAL INJURIES, OR ACTS UNACCOMPANIED WITH MALICE**, draw after them only their immediate and direct consequences, and not those remote and speculative. In such cases, damages are merely compensatory. *Id.*
5. **GROSSLY NEGLIGENT OR MALICIOUS ACTS** are the subject of large damages, resting in the discretion of the jury, uninfluenced by prejudice or passion. *Id.*
6. **DAMAGES FOR INJURIES TO PROPERTY** vary according to the claimant's right. *Id.*
7. **OWNER OF FREEHOLD MAY RECOVER FOR INJURY** which permanently affects or depreciates his property; but a tenant or one having only a possessory right can recover only for an injury to his use or enjoyment of it. *Id.*
8. **WHEN OWNER OF PROPERTY IS IN ACTUAL POSSESSION** and use of it, he is entitled to recover all damages flowing directly from the tort complained of, whether the injury is permanent or temporary. *Id.*
9. **COMPENSATION FOR DIMINISHED ENJOYMENT OR USE OF PROPERTY** for a number of years does not compensate for the diminished value of the land itself. *Id.*
10. **WHEN LAND IS LEASED, INJURY WHICH DIMINISHES ITS ANNUAL PROFIT** to the tenant, and also the value of the property itself, is the subject of a double action, in which the tenant and the landlord may each recover his loss. *Id.*
11. **WHEN OWNER OF LAND IS ALSO OCCUPANT**, he cannot recover damages for injury to the use, and also for the permanent injury. He cannot recover double compensation for the same loss. *Id.*
12. **WHEN THERE ARE DIFFERENT MODES** of measuring damages resulting from a tort, depending on the circumstances, the only proper way is to hear all the evidence, and then to instruct the jury, according to the nature of the case, and the extent of the injury is also a fact for the jury. *Id.*
13. **IN ACTION FOR INJURY TO LAND FROM DEPOSITS OF SAWDUST**, defendant is liable only for the deposit made by him; if others have contributed to the deposit, he cannot be held liable for their injury, but his deposit must be separated by the best proof the nature of the case affords, and his liability ascertained accordingly. *Id.*

DEBTOR AND CREDITOR.

PROPERTY NOT SUBJECT TO CREDITOR'S DEMANDS. — At the request of A, an insolvent, B bought stocks for the benefit of the wife and family of A. The latter had no control over the investment, none of his money was in it, nor did B look to him for remuneration in case it should prove unprofitable afterwards. B conveyed the stock to the beneficiaries, and it was held that it could not be subjected to the payment of the debts of A. *Waddington v. Loker*, 260.

See CORPORATIONS; FRAUDULENT CONVEYANCES; PAYMENT.

DEEDS.

1. IF DEED CONTAINS ANY DESCRIPTIVE LANGUAGE, whatever the style, that will enable one to identify the land, it is so far good. *Nelson v. Brodack*, 328.
2. DESCRIPTION OF LAND NEED NOT BE CONTAINED IN BODY OF DEED; if it refers for identification to some other instrument or document, it is sufficient. Or if no reference is made, surveys, monuments, etc., may be ascertained to locate the land. But while there is nothing technical as to matter of description, and the intention of the parties governs, it must be contained in the deed, or references, express or implied, with such certainty that the locality of the land can be ascertained from it. *Id.*
3. GRANTEE WHO RELIES UPON RECITAL IN DEED OF NUMBER OF ACRES CONVEYED, AS GUARANTY OF QUANTITY, thereby mistakes the legal effect of the instrument, and cannot obtain any relief upon that ground. *Martin v. Hamlin*, 181.
4. VERBAL AGREEMENT, CONTEMPORANEOUS WITH EXECUTION OF DEED AND NOTES AND MORTGAGE, ON CONSUMMATION OF SALE OF LAND, that if the land, on being surveyed by the grantee, fell short of the quantity which the grantor said he would warrant, a sum proportioned to such deficiency should be indorsed on the mortgage, is merged in the deed and other writings, which must, in the absence of fraud or mistake, be conclusively presumed to contain the whole contract; and besides, such verbal agreement tends to contradict the notes and mortgage given. *Id.*
5. MISTAKE IN DESCRIPTION OF LAND IN DEED MAY BE CORRECTED BY SUBSEQUENT DEED thereof, executed by the same grantor, for the purpose of correcting the description and confirming in the grantee the title to the land intended to have been described in the prior deed, and the two deeds, taken together, will operate to pass the title to the grantee named therein. *Greve v. Coffin*, 229.
6. AD VALOREM STAMP IS NOT REQUIRED ON DEED REFORMING DESCRIPTION IN PRIOR DEED of the same premises. A stamp affixed to such deed as a contract or agreement is sufficient. *Id.*

See ACKNOWLEDGMENTS; BOUNDARIES; EXHIBITIONS.

DEFINITIONS.

HOUSEHOLD FURNITURE COMPRISES EVERYTHING that contributes to the convenience of the householder or ornament of the house. *Heop's Appeal*, 562.

DOMICILE.

See TAXATION, 2, 3.

EASEMENTS.

EASEMENT PROPER, WHEN GRANTED TO ONE IN GROSS, IS MERE PERSONAL RIGHT, and cannot be assigned or inherited; but a profit *a prendre*, when in gross, is treated as an estate or interest in the land itself, and may therefore be for life or inheritance. *Tinicum Fishing Co. v. Carter*, 597.

See ESTATES; WATERS, 12-15; WAY.

EJECTMENT.

1. SUIT IN EJECTMENT MUST PROCEED in the name of the plaintiff if he is a non-resident, even after a suggestion that he is insane, as the court has no power to appoint a guardian. *Allen v. Ranson*, 282.

2. WHERE PARTY SUED IN EJECTMENT has both the possession and a life estate in the property, and has conveyed it by mortgage to the plaintiff, he cannot retain the possession, by showing that when his curtesy ceases, the heirs of his deceased wife may perhaps be entitled to it. *Id.*
3. MORTGAGEE, WITHOUT FORECLOSURE OR SALE, may, after maturity of the obligation, maintain ejectment against the mortgagor. *Id.*
4. WHERE DEFENDANT IN EJECTMENT HAS POSSESSION and a life estate in the property, his heirs cannot be made parties defendant with him. *Id.*
5. PLAINTIFF IN EJECTMENT MUST RECOVER ON STRENGTH OF HIS OWN TITLE. *Greve v. Coffin*, 229.
6. IN EJECTMENT, DEFENDANT NEED NOT SET UP TITLE in himself, or in any one else; it is involved in his denial of plaintiff's right. But if he wishes to avail himself of facts not amounting to such denial, he must plead them. *Nelson v. Brodhack*, 328.
7. IN EJECTMENT, VALUE OF RENTS and profits may be proved, but the value of the premises cannot. *Allen v. Ranson*, 282.

See STATUTE OF LIMITATIONS.

ELECTIONS.

IT IS ERROR TO ADMIT AS EVIDENCE CERTIFIED LIST OF VOTERS, ordered by the board of registration to be stricken from the list of registered voters. Only the record, or a copy thereof properly certified to be a copy, is so admissible. *Phares v. State*, 777.

EMINENT DOMAIN.

STATE HAS NO MORE RIGHT TO INTERFERE WITH PRIVATE PROPERTY WITHOUT COMPENSATION, to make or improve a canal, than it has for a road upon land. *Ryan v. Brown*, 154.

See RAILROADS.

EQUITY.

1. WHERE ONE OF TWO INNOCENT PERSONS MUST SUFFER by the wrong of another, the one who enables such other to commit the wrong must bear the consequences. *Spraghts v. Hawley*, 452.
 2. EQUITY AIDS THE VIGILANT AND ACTIVE, but not those who sleep. Nothing can call the court into activity but conscience, good faith, and reasonable diligence. *Germantown Passenger R. R. Co. v. Filler*, 546.
- See ACCOUNTING; ASSIGNMENTS, 2-6; BONA FIDE PURCHASERS; CORPORATIONS, 8, 18, 20, 21; DAMAGES, 1; JURY AND JURORS; SET-OFF, 1; TRUSTS.

ESTATES.

1. LAND, OR INTEREST IN LAND, CANNOT BE PRESCRIBED FOR; and it seems a profit *a prendre* is within the rule, especially when it is not pleaded in a *que* estate, but in a man and his ancestors. *Tinicum Fishing Co. v. Carter*, 597.
2. LIMITATION TO HEIRS ON FAILURE TO APPOINT enlarges a life estate to a fee. *Dobson v. Ball*, 586.
3. WHEN LIFE ESTATE ONLY IS GIVEN, followed by general power of appointment, and on failure to appoint, to children, or to special heirs, the power to appoint will not enlarge the estate of the *cestui que trust* to a fee, and on failure to appoint, the children, or special donees in remainder,

take by purchase, and not by way of limitation as heirs of the cestui que trust. *Id.*

ESTOPPEL

WHERE ONE BY EXPRESS AGREEMENT encourages another to settle on land, and go on and improve it, and expend money and labor upon it, neither he nor his heirs can afterwards take the land from the one making the improvements, though the former may have the older and better title, and be ignorant of their rights. *Miller v. Miller*, 538.

See TRESPASS, 6.

EVIDENCE

1. EVIDENCE TENDING TO ESTABLISH FACT WHICH IT IS OFFERED TO PROVE is properly received, although it may not be the most satisfactory. *Brackett v. Edgerton*, 211.
2. SEPARATE WRITTEN INSTRUMENTS MADE AT SAME TIME, between the same parties, and with reference to the same transaction, are to be read together and construed as parts of the same transaction. *Id.*
3. DECLARATION OF PARTY TO SUIT relating to the subject-matter is evidence against him, no matter when made. Whether they affect another party to the suit depends upon whether their acts were joint; if so, the declarations of one is evidence against both. *Simons v. Vulcan Oil & M. Co.*, 628.

See AGENCY, 12-14; CONTRACTS, 2-4; CRIMINAL LAW; ELECTIONS; NEW TRIAL; USAGES AND CUSTOMS; WITNESSES.

EXECUTIONS.

1. THAT REAL INTERESTS SEIZED IN EXECUTION ARE TO BE SOLD AND PASS AS REAL ESTATE is a rule which admits of few, if any, exceptions. *Pattison's Appeal*, 637.
2. ONE WHO COMPLAINS OF EXCESSIVE LEVY UPON HIS LANDS SHOULD MOVE FOR RELIEF in the court from which the execution issued, instead of proceeding by bill in equity. *Campau v. Godfrey*, 133.
3. EXECUTION SALE OF LANDS WILL NOT BE SET ASIDE FOR INADEQUACY OF PRICE ALONE, especially when it is subject to a year's redemption, of which the execution debtor does not avail himself. *Id.*
4. ONE WHO FAILS TO REDEEM LANDS SOLD ON EXECUTION WITHIN TIME LIMITED BY STATUTE, through culpable negligence or ignorance of the law, has no claim to relief in equity. *Id.*
5. SAME PRESUMPTION OF INTENDMENT CANNOT BE INFERRED from a sheriff's deed as from a direct conveyance from the grantor. In the latter case, the ambiguity is the grantor's fault; he has voluntarily sold his property, and received the proceeds, and everything should be construed more strongly against him than his grantees. *Nelson v. Brodback*, 328.
6. SHERIFF'S DEED, VOID FOR UNCERTAINTY IN DESCRIPTION of the land conveyed, is not cured by reciting notice by advertisement of the time and place of sale and the property to be sold, "a copy of which advertisement is hereto annexed, and makes part of this deed," and in the granting part reciting that he transfers to the purchaser the interests of defendant "in and to the above-described property." The advertisement cannot be deemed part of the description, and as the latter in no way refers to the former, it is not modified or controlled by it. *Id.*

7. PROCEEDS OF PROPERTY OF JUDGMENT DEBTOR SOLD ON EXECUTION BELONG AND ARE TO BE PAID TO CREDITOR upon whose execution the property is sold, and not to a judgment creditor whose execution has expired by lapse of time, and which is not therefore a lien upon the property. *Kingston Bank v. Ellings*, 516.

See CONTEMPT; CORPORATIONS, 13; CO-TENANCY, 6; FIXTURES, 3-5; TROVER, 3.

EXECUTORS AND ADMINISTRATORS.

1. WHEN TRUST FUNDS ARE STOLEN while in the hands of an executor or administrator, he is, in equity, exonerated from liability, and is from necessity a competent witness in his own behalf. In such case an equitable defense may be made in an action at law, a jury being substituted in the place of the chancellor. *State v. Meagher*, 298.
2. EXECUTORS AND ADMINISTRATORS are subject to liability only for want of due care and skill, and the measure required of them is the same demanded of bailees for hire, or that which prudent men exercise in the direction of their affairs. *Id.*
3. CARE REQUIRED OF EXECUTOR OR ADMINISTRATOR as to the property in his possession must be graduated according to its character, its value, and the convenience of its being made secure, the facility for its being stolen, and the temptations thereto. *Id.*

FACTORS.

1. DELIVERY OF GOODS TO CARRIER BY CONSIGNOR FOR TRANSPORTATION TO CONSIGNEE IS SUFFICIENT DELIVERY, and the lien of the latter for advances made upon the goods in anticipation of shipment will attach as soon as the goods are so delivered. *Prince v. Boston and Lowell R. R. Corp.*, 129.
2. POSSESSION OF BILL OF LADING SIGNED BY AUTHORITY, AND INDORSED, IS EVIDENCE OF TITLE. Even if the bill was not authorized, yet if the goods were actually sent to the consignee, his lien for advances will attach. *Id.*

See AGENCY, 3.

FISHERIES.

See WATERS, 12-15.

FIXTURES.

1. BUILDING DOES NOT BECOME PART OF REALTY, BUT CONTINUES TO BE PERSONAL CHATTEL, and the property of the person who erects it on the land of another, by the latter's permission, upon an agreement that it may be removed at the pleasure of the builder. *Goodman v. Hannibal etc. R. R. Co.*, 236.
2. WHERE LANDLORD, BEFORE EXPIRATION OF TERM, ENJOINS TENANT from removing the chattels or fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove them. *Id.*
3. PURCHASER OF REAL ESTATE AT EXECUTION SALE, WHO DETACHES FIXTURE, intermediate the sale and the giving of the sheriff's deed, is liable for its value, under the New York revised statutes, to the person only who eventually receives the deed; and if the purchaser himself receives the deed, no one can complain that he was injured by the detachment. *Id.*

4. ANNEXATION OF ARTICLE FOR PURPOSE OF PERMANENT IMPROVEMENT OF, OR USE WITH, REALTY, RENDERS IT FIXTURE, where no different intention or purpose is manifested. *Potter v. Cromwell*, 485.
5. PORTABLE GRIST-MILL IS FIXTURE, as between a purchaser of the land at execution sale and a receiver appointed in supplementary proceedings against the judgment debtor, when it is connected with other machinery in the building by a belt, and is fastened to the floor by iron rods or bolts, and is capable of being removed by taking it apart without being injured or injuring the building, but is designed as a permanent structure for use as a custom grist-mill for the neighborhood. *Id.*

FORFEITURES.

FORFEITURES ARE ODIUS IN LAW, AND ARE ENFORCED ONLY where there is the clearest evidence that that was what was meant by the stipulations of the parties. There must be no cast of management or trickery to entrap a party into a forfeiture. *Helme v. Philadelphia L. I. Co.*, 621.

FRAUD.

1. WHEN EXAMINING QUESTIONS OF FRAUD, courts will look into all the circumstances, and while express and positive proof is not required, yet mere suspicion, leading to no certain results, will not establish fraud. *Waddington v. Loker*, 260.
2. IN INVESTIGATIONS TO ESTABLISH FRAUD, great latitude of inquiry is always admissible. *Simons v. Vulcan Oil & M. Co.*, 628.

See CONTRACTS, 15; CORPORATIONS, 7.

FRAUDULENT CONVEYANCES.

1. VOLUNTARY DEED, WITHOUT CONSIDERATION, CAN ONLY BE AVOIDED by some one having equities against it. *Ryan v. Brown*, 154.
2. PARTY CANNOT WITHDRAW HIS PROPERTY FROM HIS CREDITORS, nor can he, if he owes debts, devote his capital, industry, or credit to the accumulation of property to be held by some third person, for his own use or that of his family, to the exclusion of his creditors. In such cases the law intervenes and goes behind the fraudulent and secret transaction, and subjects the property or trust funds to the payment of just and legal demands. *Waddington v. Loker*, 260.

GARNISHMENT.

See ATTACHMENT.

GIFTS.

1. WHEN GIFT IS NOT EXECUTED BY DELIVERY, but the determining act remains *in fieri*, the law gives no force to the mere intention to do it. *Crawford's Appeal*, 609.
2. WHERE HUSBAND HAS MONEY OF WIFE which he does not pay to her, but which he credited on his books as actually received by her, and carried it into an account of moneys admitted to be hers, mingled it with it, credited interest upon it, and finally consolidated the account and added interest on the total sum, — this constitutes an executed gift, followed by an express trust, in the form of an account for it and its accrued interest, which cannot be impeached by mere volunteers. *Id.*

GROWING CROPS.

GROWING CROPS PASS TO ADMINISTRATOR, AND NOT TO HEIR, and are liable to be seized and sold on execution as personal chattels of a debtor. *Pattison's Appeal*, 637.

GROWING TREES.

See STATUTE OF FRAUDS, 3, 4.

GUARANTY.

1. **GUARANTY OF COLLECTION IS UNDERTAKING BY GUARANTOR THAT DEBT WILL BE PAID**, if proper measures to collect it are taken within a reasonable time after it becomes payable. *Craig v. Parkis*, 469.
2. **GUARANTOR OF COLLECTION WILL BE DISCHARGED BY DELAY OF SIX MONTHS** in taking measures to collect the debt, where all the principals reside in the state and can be personally served. *Id.*
3. **GUARANTOR OF COLLECTION WILL BE DISCHARGED BY UNREASONABLE DELAY** in taking measures to collect the debt, notwithstanding that during the whole period the principals were hopelessly insolvent. *Mason, Woodruff, and James, JJ.*, dissenting. *Id.*

See NEGOTIABLE INSTRUMENTS, 3.

HIGHWAYS.

1. **ONE WHO GRANTS LAND AS BOUNDING ON STREET, AND OWNS STRIP OF LAND SO DESCRIBED AS STREET**, cannot be compelled in equity, at the suit of the grantee, to open and maintain the strip as a street fit for travel. *Hennessey v. Old Colony and Newport R. R. Co.*, 127.
2. **BOUNDARY UPON STREET DOES NOT IMPLY COVENANT THAT IT HAS BEEN, or will be, maintained so as to be fit for travel.** *Id.*

HOMESTEADS.

See LIENS, 4.

HOMICIDE.

See CRIMINAL LAW.

HUSBAND AND WIFE.

1. **EVIDENCE THAT TITLE TO LAND ON WHICH HOUSE WAS BUILT WAS IN MARRIED WOMAN**, that she knew where her husband got the brick with which the house was built, and the price of them, and that she furnished what money was paid on account of the brick and the building of the house, tends to show that her husband acted as her agent in the purchase of the brick, and will support a finding of the court that they were sold and delivered to her, and that she agreed to pay for them. *Tuttle v. Howe*, 205.
2. **VALUE OF IMPROVEMENTS PLACED BY HUSBAND ON LAND OF WIFE WILL BE APPLIED** by appropriate equity proceedings, to the payment of claims existing against him at the date of the investment. On a proper case made, equity will decree a sale, and a division of the proceeds according to the rights of the respective parties. *Kerby v. Bruns*, 376.
3. **TRANSACTION DOES NOT AMOUNT TO GIFT BY WIFE**, where the husband receives, counts, and keeps money paid her by her debtor, and afterwards

invests it for her, but at the time of payment gives her no security for it, and eight or more years thereafter gives her a judgment note for it. *Bergey's Appeal*, 578.

4. WHERE MONEY IS PAID WIFE, but the husband receives, counts, and keeps it, she is not bound to rescue it from him, or proclaim that it is not a gift. She may rest on the idea that his receipt of it, in her presence, was with intent to take care of it for her. *Id.*
5. WHERE HUSBAND RECEIVES AND KEEPS MONEY paid to the wife, and which does not constitute a gift from her to him, he becomes the trustee for the wife, and equity will compel him to account to her for such money. *Id.*
6. MONEY PAID WIFE, BUT RECEIVED, COUNTED, AND KEPT BY HUSBAND, and afterwards invested by him for her, does not constitute a gift from the wife to the husband, but makes him a trustee for her, and he cannot change the character of the transaction into a loan by giving a bond to secure its payment to her. *Id.*
7. MARRIED WOMAN MUST SHOW BY CLEAR AND SATISFACTORY PROOF THAT PROPERTY CLAIMED BY HER is an acquisition by her own means, or the means of friends independently of her husband. This being established, she is entitled to the full benefit of the property as her separate estate. *Id.*

See DEBTOR AND CREDITOR; GIFTS, 2; SPECIFIC PERFORMANCE; TRUSTS, 16.

INFANCY.

See MALICIOUS PROSECUTION; NEGLIGENCE.

INJUNCTIONS.

1. GRANTING OR REFUSING OF WRIT OF INJUNCTION is a matter resting in the sound discretion of the court. *Shoemaker v. National Mechanics' Bank of Baltimore*, 73.
2. IT IS DUTY OF PARTY APPLYING FOR WRIT OF INJUNCTION, not only to make a full and candid disclosure of all the facts in his case, but also to produce, if in his power, strong *prima facie* evidence in support of the averments upon which his alleged equity rests. *Id.*
3. BANKING CORPORATION — INJUNCTION TO RESTRAIN MISAPPLICATION OF FUNDS. — A bank loaned money in excess of the amount it was authorized by law to lend, taking collateral securities therefor. A stockholder of the bank filed a bill, alleging in substance the illegality of the loan, that no title or interest in said collaterals passed to the bank, and that they were worthless and fraudulent; and praying for an injunction to restrain the bank from misapplying its funds in the prosecution of suits to recover their value. It was held, — 1. That the failure of the complainant to file copies of the pleadings and proceedings in the suits sought to be enjoined, as exhibits with his bill, was a fatal defect; 2. That although the loan by the bank was illegal and void, yet, being an executed contract, the bank acquired an absolute or qualified interest in or title to the securities; 3. That the bank directors, when protecting such title or interest, by suit or otherwise, are acting within the sphere of their authority, and cannot be controlled by the courts. *Id.*

See TRADE-MARKS, 11-14; TRESPASS, 2.

INSANITY.

See EMBODIMENT.

INSOLVENCY.

See CORPORATIONS.

INSURANCE.

1. CONDITION IN POLICY OF INSURANCE IS VALID WHEN DECLARED THAT NO ACTION SHALL BE SUSTAINABLE THEREON unless commenced within six months after a loss occurs, and is to be construed in connection with another condition in the policy, that the payment of losses shall be made in sixty days from the date of the adjustment of the proofs of loss. Thus construed, the limitation of six months does not begin to run until the expiration of sixty days from the date of said adjustment, when the right of action against the company is complete. *Mayor of New York v. Hamilton Fire Ins. Co.*, 400.
2. POLICY OF INSURANCE IS NOT VOID because the risk was taken in violation of a by-law providing that certain risks should not be taken unless approved by a special committee, the policy having been issued by the duly authorized agents of the company, and upon a full knowledge of all the facts material to the risk. *Merchants' Ins. Co. v. Curran*, 361.
3. IF DEBTOR, AT OR IMMEDIATELY AFTER EXECUTION OR ASSIGNMENT of a mortgage on his property to a creditor, transfers to him a policy of insurance against fire on the mortgaged premises, though nothing be expressed at the time, or it is transferred as collateral security generally, it is a conclusion of law that the policy is to be held by the creditor as collateral security for the mortgage, and it requires an express agreement to authorize the assignee to apply the insurance money, in case of loss, to any other debt or liability; and so the jury should be instructed. *Buckley v. Garrett*, 564.
4. IN ACTION ON POLICY OF LIFE INSURANCE, IT IS COMPETENT FOR PLAINTIFF TO PROVE a custom among life insurance companies to allow thirty days' grace for payment of premiums due, if the insured is in usual health, even where a clause of forfeiture for non-payment on the day exists. *Helme v. Philadelphia L. I. Co.*, 621.
5. WHERE PRACTICE OF INSURANCE COMPANY IS TO GIVE NOTICE OF ACCRUING PREMIUMS, and fails to do so on the occasion for which a policy was forfeited, or so deals with the insured as to induce a belief that the clause of forfeiture will not be insisted on, etc., thus putting the insured off his guard, the company cannot take advantage of the default which it encouraged. *Id.*
6. IT IS NOT TO BE DOUBTED THAT INSURANCE COMPANY MAY WAIVE defective compliance with the rules of insurance. *Id.*

INTERNATIONAL LAW.

See WAR.

JUDGMENTS.

- RECEIPT FOR SUM DESIGNATED as in satisfaction of a certain judgment, and containing the following clause: "And said sum is in full satisfaction of all claims and demands I have or hold against said B. and W., or either

of them, up to this date," — will be confined in its effect to the judgment therein named, and not permitted to release another action then pending between the same parties. *Grumley v. Webb*, 304.

See ATTORNEY AND CLIENT; CRIMINAL LAW, 21, 22; OFFICE AND OFFICERS, 1.

JURISDICTION.

VIRGINIA COUNTY COURTS ARE COURTS OF GENERAL JURISDICTION in all civil causes, and it is to be presumed, in the absence of proof to the contrary, that the court had jurisdiction of the particular case. When the face of the record discloses the want of jurisdiction, the presumption will not arise. *Washington etc. R. R. Co. v. Alexandria etc. R. R. Co.*, 710.

See SET-OFF, 4.

JURY AND JURORS.

ON HEARING BEFORE JURY OF CASE COMBINING LEGAL AND EQUITABLE PROCEEDINGS, if the plaintiff voluntarily takes a nonsuit, without a submission of the equity branch to the court at all, the supreme court will not relieve him. *Kirby v. Bruns*, 376.

See NEGLIGENCE.

LANDLORD AND TENANT.

1. RENT NOT DUE IS INCIDENT OF REVERSION, AND PASSES WITH IT TO ASSIGNEE IN BANKRUPTCY OF LANDLORD, as against his judgment creditor who served the tenants with an attachment in execution, after which and before the rent fell due, the landlord was decreed a bankrupt, and an assignee appointed. *Evans v. Hamrick*, 595.
2. EQUITY WILL HEAR EVIDENCE, FIX AMOUNT OF RENT, and decree specific performance, or hold the covenantor liable in damages for the breach of his covenant to renew a lease, providing that the amount of rent for the renewal is to be ascertained by what responsible parties would agree to pay for the use of the premises, as that fixes the rent with as much certainty as though it were to be determined by appraisers, and only means the highest market value of the premises at the time of renewal or valuation. *Arnot v. Alexander*, 252.
3. WHERE COVENANT FOR RENEWAL OF LEASE provides that the lease shall be renewed if the parties can agree upon terms, or if the lessee is willing to give as much as any other responsible party will agree to give, the lessee may elect whether he will take damages at law, or have specific performance in equity. *Id.*
4. AGREEMENT TO LET FARM FOR TERM OF YEARS, EACH PARTY TO FURNISH PART OF STOCK, seeds, tools, etc., and one to occupy and work the farm and have certain specified supplies for his family, after which all proceeds to be divided equally, is to be regarded as a special contract, and the measure of damages for a breach thereof by the owner of the farm is the value of the contract, that is, what such a privilege of occupancy and working the farm, subject to the conditions of the agreement, and under all the contingencies which were liable to affect the result, is worth. *Taylor v. Bradley*, 415.
5. ACTION FOR DAMAGES FOR BREACH OF CONTRACT TO LET FARM ON SHARES IS MAINTAINABLE IMMEDIATELY upon the refusal of the owner to per-

form, without awaiting the expiration of the term. Whether the opinion of witnesses are admissible in evidence to prove the value of such a contract, *quære*. *Id*.

See AGENCY, 17; FIXTURES, 2.

LARCENY.

See CORPORATIONS, 9; CRIMINAL LAW, 19

LIBEL.

See SLANDER.

LIENS.

1. MATERIAL-MAN MAY ENFORCE LIEN AGAINST SEPARATE ESTATE of a *ferme* covert. *Tuttle v. Howe*, 205.
2. LIEN OF MECHANIC OR MATERIAL-MAN MAY BE ASSIGNED, under the Minnesota statute, and the assignee may maintain an action in his own name for its enforcement. *Id*.
3. IF TRACT OF LAND UPON WHICH BUILDING, ON WHICH LIEN IS CLAIMED, IS SITUATED CONTAINS MORE THAN ONE ACRE, the claimant may carve out the acre upon which he will claim his lien, without consulting the owner of the tract. *Id*.
4. CLAIMANT OF MECHANIC'S LIEN, ANTERIOR AND SUPERIOR TO HOMESTEAD right, may enforce his lien without any reference whatever to such homestead right, and the homestead claimant cannot be permitted to exercise a right of selection of the land which he regards as his homestead, so as to interfere with the enforcement of the lien. *Id*.

LIFE ESTATES.

See ESTATES.

MALICIOUS PROSECUTION.

INFANT IS NOT LIABLE FOR MALICIOUS PROSECUTION OF SUIT DURING HIS INFANCY, where it was brought in his name by his *prochein ami*, and without his knowledge or authority, even though he expressly assented to the suit after he had knowledge of it. *Burnham v. Seaverns*, 123.

MANSLAUGHTER.

See CRIMINAL LAW.

MARRIAGE AND DIVORCE.

EVIDENCE OF ACTS OF ADULTERY BETWEEN LIBELER AND HIS PARAMOUR, COMMITTED AFTER FILING OF LIBEL FOR DIVORCE against him by his wife, is competent to show the nature of the intercourse between them at the time when the adultery charged in the libel is alleged to have been committed. *Thayer v. Thayer*, 110.

MARRIED WOMEN.

MARRIED WOMAN HAS CAPACITY TO CONTRACT FOR SALE OF HER REAL ESTATE, and to convey it in the precise statutory method conferring the power. *Dankel v. Hunter*, 651.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. RULE THAT PRESCRIBES RESPONSIBILITY OF PRINCIPALS FOR ACTS OF OTHERS is based upon their power of control. If the master cannot command the servant, the acts of the servant are clearly not his. *Hilendorf v. City of St. Louis*, 352.
2. MASTER IS RESPONSIBLE, CIVILLY, FOR FRAUD, NEGLIGENCE, or other wrongful act of his servant, committed in the transaction of his business, but not for willful injury committed by the servant while so engaged, unless it was done by the express or implied authority of the master. *Mali v. Lord*, 448.
3. ONE EMPLOYED TO SELL GOODS IN HIS EMPLOYER'S ABSENCE, OR TO SUPERINTEND HIS EMPLOYER'S BUSINESS at a particular store, has no implied authority to arrest and search a person suspected of having stolen goods and secreted them about his person, so as to render the employer liable in damages for such an arrest and search. *Id.*
4. SERVANT HAS NO IMPLIED AUTHORITY TO DO THAT WHICH the master himself, being present, would not be authorized to do. *Id.*
5. WHEN INJURY HAPPENS TO SERVANT in the course of his employment, the master is liable if it was occasioned by his negligence. *Johnson v. Bruner*, 613.
6. IF INJURY TO SERVANT IS RESULT OF HAZARDOUS EMPLOYMENT, without fault on the part of the master, he is not liable; but if his negligence was the direct and proximate cause of the injury, he is liable, whether the employment was hazardous or not. *Id.*
7. WHEN SERVANT'S MISCONDUCT CONTRIBUTES to his injury, or when it arises from the omission of a duty defined or prescribed by law, negligence is a question of law, and not of fact for the jury. *Id.*

MECHANICS' LIENS.

See LIENS.

MORTGAGES.

1. CONVEYANCE BY MORTGAGEE OF MORTGAGED PREMISES TO THIRD PARTY IS ENTIRELY INOPERATIVE, unless it was intended to operate as an assignment; and such intention must be made to appear. *Grave v. Coffin*, 229.
2. MORTGAGEE WITH POWER OF SALE is trustee as well as creditor, and cannot become purchaser at his own sale, either directly or indirectly, so as to cut off the equity of redemption. Such sale is not void; it is valid for all purposes except that the mortgagor may redeem. *Allen v. Ransom*, 282.
3. STIPULATION IN MORTGAGE, PROVIDING that the whole debt secured thereby shall become due and payable, upon failure to pay the interest annually, is a legal and valid stipulation, and is not in the nature of a penalty or forfeiture. *Schooley v. Romain*, 87.
4. ASSIGNEES OF EQUITY OF REDEMPTION TAKE LAND subject to the mortgage and the covenants therein, which may be enforced against the land in the same manner and to the same extent as if the assignment had not been made. *Id.*
5. REDEMPTION BY OWNER OF PROPERTY SOLD UNDER FORECLOSURE ANNULS SALE and defeats the title of the purchaser thereof. *Horton v. Magill*, 222.

6. ONE WHO ACQUIRES ESTATE OF PURCHASER AT FORECLOSURE SALE, and subsequently purchases the interest of one of two co-tenants who owned the property before the sale, has the right to hold the first-named estate or interest and enforce it for his own benefit, and this right is not impaired by his subsequently acquiring the interest of such co-tenant. No merger of the estate takes place in such case. *Id.*
7. SHERIFF, IN RECEIVING MONEY PAID FOR REDEMPTION, ACTS AS OFFICER OF LAW, and not as the agent of the party who purchased at the sale. *Id.*
8. ESTATE OF PURCHASER AT FORECLOSURE SALE, PRIOR TO EXPIRATION OF TIME TO REDEEM, is that of a mortgagee before foreclosure, — an equitable estate or interest. *Id.*
9. MERE POSSESSION OF MORTGAGED CHATTEL BY MORTGAGOR IS NOT SUCH EVIDENCE OF OWNERSHIP, or authority to sell the property, as will protect, against the claim of the mortgagee, one who, as agent of the mortgagor, sells the property and pays the proceeds in good faith to his principal, in the belief that he was the true owner. *Spragles v. Hawley*, 452.

See ASSIGNMENTS, 1; EJECTMENT, 3; TRUSTS, 15.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 27, 28.

MURDER.

See CRIMINAL LAW.

NEGLIGENCE.

1. NEGLIGENCE IS GENERALLY QUESTION OF FACT FOR JURY. This is always so when there is any doubt as to the facts, or the inferences to be drawn from them. *Johnson v. Bruner*, 613.
2. WHEN FACTS PRESENT CLEAR CASE OF NEGLIGENCE, it is a question of law. *Id.*
3. IT SHOULD BE LEFT TO JURY TO SAY, IN ACTION FOR DAMAGES ON ACCOUNT OF NEGLIGENCE, whether, notwithstanding the imprudence or neglect of the injured person, the defendant could not, in the exercise of reasonable care and diligence, have prevented the injury. *O'Flaherty v. Union R'y Co.*, 343.
4. IN DETERMINING WHAT WOULD BE BAR TO ACTION ON GROUND OF CONTRIBUTORY NEGLIGENCE, the same rigid rule would not be applied to an infant, idiot, or insane person, as to one who had arrived at years of ordinary judgment and discretion. All that is necessary to give a right of action for an injury inflicted is that the injured person shall have exercised care and prudence equal to his capacity. *Id.*
5. TO CONSTITUTE NEGLIGENCE IN PARENTS, PRECLUDING RECOVERY FOR INJURIES TO THEIR CHILDREN, there must be an omission of such care as persons of ordinary prudence exercise and deem adequate in the care of children. *Id.*
6. TRAVELER APPROACHING RAILROAD TRACK IS BOUND TO USE HIS EYES AND EARS, so far as there is opportunity; and negligence of the railroad company in giving signals will not excuse his omission to be diligent in such use of his own means of avoiding danger. *Brust v. Hudson R. R. Co.*, 405.

7. **WHEN QUESTION WHETHER TRAVELER USED ORDINARY CARE AND PRUDENCE, IN ANY GIVEN CASE,** becomes so complicated and involves so many details that honest and intelligent men, acting without bias or partiality, in a single and sincere desire to determine according to the truth, may reasonably differ in their conclusions, then the question should be left to the jury. *Id.*
8. **IT WILL BE PRESUMED THAT PERSON INJURED IN ATTEMPTING TO CROSS RAILROAD TRACK DID NOT LOOK** before crossing, if it appears that, had he done so, he would have seen the approaching train in season to have avoided it. *Wilcox v. Rome etc. R. R. Co.*, 446.
9. **TRAVELER IN CROSSING RAILROAD TRACK IS BOUND TO EXERCISE** at least ordinary sense, prudence, and capacity; and this requires that he should use his ears and eyes, so far as he has opportunity to do so. Failing in this duty, he will be deemed guilty of contributory negligence, precluding a recovery in his favor in case of injury. *Id.*
10. **NEGLIGENCE OF RAILROAD COMPANY IN NOT RINGING BELL OR SOUNDING WHISTLE** near the crossing of a highway does not relieve a person, who is about to pass over the highway, from the obligation to employ his sense of hearing and seeing in order to ascertain if a train is approaching. *Id.*
11. **NO RULE OF LAW REQUIRES RAILROAD COMPANY TO KEEP FLAGMAN AT STREET OR ROAD CROSSING** to give notice of the approach of trains, and the omission to do so is not negligence, unless the company, by an established and hitherto uniform practice of that kind, have given ground for expectation that such warning would be given. *Ernst v. Hudson R. R. Co.*, 405.
12. **WHERE EVIDENCE IS CONFLICTING AS TO CONCURRENT NEGLIGENCE OF PARTY INJURED,** the jury may, in connection with all the facts and circumstances of the case, infer the absence of fault from the known disposition of men to avoid injury to themselves. *Northern Central R'y Co. v. State*, 69.
13. **ACTION WILL LIE WHERE IT APPEARS,** either that the party inflicting the injury might, by a proper degree of caution, have avoided the consequences of the injured party's neglect, or that the latter could not, by ordinary care, have avoided the consequences of the defendant's negligence. *Id.*
14. **WHERE IT APPEARS THAT NEGLIGENCE OF BOTH PARTIES WAS CONCURRENT,** and co-operated to produce the injury complained of, no action will lie, the law regarding the causes as equally proximate to the effect produced, and not, therefore, susceptible of apportionment. *Id.*
15. **IN ORDER THAT PERSON MAY EXERCISE PROPER CARE IN AVOIDING CONSEQUENCES** of his own or another's negligence, it is necessary that he have time to become aware of the conduct and situation of the latter. *Id.*
16. **INSTRUCTION TO JURY THAT PLAINTIFF COULD NOT RECOVER FOR INJURY TO PERSON DECEASED,** if the latter, "by his own neglect or want of care, contributed to the accident," fails to define what character of neglect or want of care would exclude the right to recover, and is clearly erroneous. *Id.*
17. **RUNNING AWAY OF TEAM IS EFFICIENT CAUSE OF INJURY,** if it put in operation the force which was the immediate and direct cause of the injury. And where a team, negligently left unhitched in the principal business street of a town, runs away, and after an attempt on the part of people in the street to stop it, runs into another team properly hitched at the side of the street, and the latter team runs away, and

collides with and injures a horse standing on the side of the street, the injury is the natural and proximate result of the negligent act of the owner of the first-mentioned team. *Griggs v. Fleckenstein*, 199.

18. PLAINTIFF CANNOT RECOVER FOR INJURY TO PROPERTY IF HIS OWN NEGLIGENCE CONTRIBUTED thereto, or if, by the exercise of ordinary care, he could have avoided such injury. *Id.*
19. LEAVING HORSE UNHITCHED IN STREET IS NOT IN ITSELF NEGLIGENCE. Whether it is negligence or not will depend upon the circumstances of the case, and is a question to be determined by the jury from the facts. And in determining that question, testimony that the horse was trustworthy to stand unhitched in the street is properly admissible. *Id.*

See CORPORATIONS, 10; DAMAGES; MASTER AND SERVANT.

NEGOTIABLE INSTRUMENTS.

1. COMMISSARY VOUCHER IS NOT IN COMMERCIAL SENSE a bill of exchange or negotiable instrument, and the law merchant has no application to it. It is, however, property, and when actually sold, passes by delivery like other personal property. But the purchaser can acquire no greater right than that of the seller, and when the property is stolen, there can be no further transfer. *Koch v. Branch*, 324.
2. MERK POSSESSION BY THIRD PARTY OF UNINDORSED NEGOTIABLE PAPER, payable to the order of the payee therein named, is not even *prima facie* evidence of title in the holder as against such payee. *Vaseline v. Wilding*, 347.
3. ONE WHO WRITES HIS NAME ON BACK OF NON-NEGOTIABLE NOTE IS LIABLE AS GUARANTOR OR MAKER to the holder thereof, and is not entitled to have the notes presented for payment when due, or to be given notice of non-payment. *Cromwell v. Hewitt*, 527.
4. MEANING, EXTENT, AND TRUTH OF REPRESENTATIONS MAY BE PROPERLY LEFT TO JURY, where there is evidence that a party, on transferring the note of a third person, represented it to be "as good as cash, and that the maker was perfectly responsible," and also that it was understood that the note was not to be presented at once. *Abell v. Munson*, 165.
5. ONE WHO WRITES HIS NAME ON BACK OF CHECK FOR PURPOSE OF DEPOSIT IN BANK, and then declines to take it, but allows the holder to receive it thus indorsed and to depart, is liable as indorser to any subsequent *bona fide* holder, for value. *Turnbull v. Bowyer*, 523.
6. INDORSER OF NEGOTIABLE PAPER WARRANTS GENUINENESS OF PRIOR SIGNATURES to every subsequent *bona fide* holder, for value; and if the signatures are forgeries, he is at once liable upon his warranty to such subsequent holder, without presentment for payment or notice of non-payment. *Id.*
7. EVIDENCE IS ADMISSIBLE TO SHOW THAT DRAWERS OF CHECK INTENDED TO MAKE IT PAYABLE TO PAYEES OF ANOTHER CHECK, but by mistake the names of the payees were misspelled, instead of to fictitious persons, so that the holder could use it without their indorsement. *Id.*
8. NOTE IS MATERIALLY ALTERED, AND IS THEREFORE NOT ADMISSIBLE in an action against the indorser, where the evidence already showed that the treasurer of a corporation drew the note in blank, obtained the indorsement of the president thereon with the affix "Pres't," he refusing to indorse it as an individual, filled up the note with the president's name as payee, and the amount, erased the word "Pres't" from the indorsement,

- and then gave it to the holders, who took it for a precedent debt due them from the corporation, and with knowledge that the indorser was president thereof. *Sharpe v. Bellis*, 618.
9. NOTE IS THAT OF CORPORATION, AND NOT OF INDIVIDUAL, where it was made by one who was the treasurer of the corporation to the order of the payee, personally, without any designation of the corporation of which he was president, but was indorsed by him with the affix "Pres't," if the holders, who took it thus indorsed, knew that the indorser was the president, although, it seems, the indorser would have been individually liable if the holders were strangers to this fact. *Id.*
 10. DEMAND OF PAYMENT OF CHECK MADE BY RESIDENT OF VICKSBURG upon bank in New Orleans while commercial intercourse between Vicksburg and New Orleans was prohibited by proclamation of the President, was illegal. *Billgerry v. Branch and Sons*, 679.
 11. NOTICE OF DISHONOR OF CHECK DEPOSITED IN POST-OFFICE AT NEW ORLEANS while that city was under permanent federal occupancy and control, and addressed to Petersburg, Virginia, during the pendency of the civil war, was of no avail, unless it were shown that the law or a general usage required the letter containing the notice to be preserved by the postmaster until the restoration of mail communication, and then forwarded to its destination. *Id.*
 12. PLEDGEE MAY MAINTAIN ACTION IN HIS OWN NAME UPON PROMISSORY NOTE payable to order, transferred, after its maturity without indorsement by the payee, as collateral security for the payment of a debt due on a certain day, where the pledgor has made default in the payment of the debt which it was pledged to secure. And no demand by the pledgee is necessary, in such case, to enable him to sue. *White v. Phelps*, 190.
 13. PLEA OF PAYMENT IN ACTION ON BILL OF EXCHANGE CONFESSES the cause of action as set forth in the declaration, and it is error to permit evidence to be heard or to require the plaintiff to answer interrogatories tending to show that the bill was not made by the defendant in his individual capacity, but as president of a corporation. *Rand v. Hale*, 761.
 14. DRAWER OF BILL OF EXCHANGE, SIGNED "CHAS. F. HALE, PRES'T," IS INDIVIDUALLY LIABLE THEREON. The addition of the word "Pres't" to his signature does not shift the responsibility from him to a company of which he was president, so far as the holder is concerned. *Id.*
 15. IN SUIT ON NOTE, PLEAS OF NON EST FACTUM and payment or release are not inconsistent. *Nelson v. Brodbeck*, 329.
 16. COMPLAINT SUFFICIENTLY STATES CAUSE OF ACTION, although after setting out certain valid notes it states that they were surrendered and canceled, the defendant giving in lieu thereof certain other notes of the like amount, in which usurious interest was reserved for an extension of the time of payment; and the plaintiff is entitled to recover the amount actually due upon the valid notes. *Winsted Bank v. Webb*, 435.
 17. IN ACTION AGAINST DRAWER OF BILL OF EXCHANGE without notice of dishonor, plaintiff may bring his case *prima facie* within the exception or rule which excuses want of notice by alleging that defendant had no funds in the hands of the drawee, and if there are other facts neutralizing the effect of that, the burden is on the defendant to plead and prove them. *Merchants' Bank of St. Louis v. Easley*, 287.
 18. ACCOMMODATION DRAWER OF BILL OF EXCHANGE is entitled to notice of dishonor, when there is no fund in the hands of the drawee. *Id.*

19. **DRAWER OF BILL OF EXCHANGE IS PRESUMED** to be an interested and benefited party, as drawing for his own use, and the burden is on him to prove himself an accommodation drawer. *Id.*
 20. **WHERE MAKER AND HOLDER OF OVERDUE NOTE AGREE FOR EXTENSION** of its payment for about ten months, provided a third person be procured to indorse it, and such third person, without any knowledge of such agreement, writes his name on the back of it, with the date, this does not amount to a taking up and reissue of the note. Such third person is not to be treated as a maker, because he did not sign at the time of the making of the note; nor as a guarantor, because the contract of guaranty was not written out expressing the consideration; and if considered an indorser, it was of a note payable on demand, and he was entitled to demand and notice within a reasonable time, and was discharged by the agreement, made without his consent, to forbear. *Moor v. Folson, 227.*
 21. **NEGOTIABLE INSTRUMENT PAYABLE AT TIME CERTAIN IS OVERDUE** as soon as that time has passed, whether payable generally or at a specified place, and one who takes it after it is due gets no better title than the party had from whom he received it. *First Nat. Bank of St. Paul v. County Com'rs of Scott County, 194.*
- See **ASSIGNMENTS, 2-6; BANKS AND BANKING; COMMON CARRIERS, 9, 10; POSSESSION; WAR.**

NEW TRIAL.

GRANTING OF NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE is a matter resting in the sound discretion of the judge trying the cause. *Merchants' etc. Ins. Co. v. Curran, 361.*

NUISANCE.

1. **CORPORATION MAY BE INDICTED FOR NUISANCE** in maintaining, continuing, and keeping up a tow-path in so careless, unskillful, and unlawful manner, that the water from their canal escaped through the locks or walls, and formed pools or ponds of stagnant water, producing miasma, and corrupting and rendering the air unwholesome, to the nuisance and injury of the public, and producing disease among them. *Delaware Canal Division Co. v. Commonwealth, 570.*
2. **WHEN CORPORATION IS INDICTED FOR NUISANCE**, the indictment need only set forth the facts constituting the offense. *Id.*
3. **WHERE CORPORATION IS CONVICTED OF PUBLIC NUISANCE**, and required to abate it, the fact that such nuisance is on the land of a stranger is no reason that it should not be abated. He cannot be allowed to control the public right to have it abated. *Id.*
4. **INDICTMENT AGAINST CORPORATION FOR NUISANCE**, averring that the latter is situated in a certain borough, is a sufficient averment of being in the neighborhood of dwellings, especially after verdict, without objection before trial. *Id.*

OFFICE AND OFFICERS.

1. **REVERSAL OF JUDGMENT REMOVING OFFICER FROM OFFICE REMOVES** the only impediment to his office, and an order that he be restored thereto is not necessary. *Phares v. State, 777.*

2. PERSON LEGALLY ELECTED, AND WHO HAS DULY QUALIFIED AS SHERIFF OF COUNTY, HAS VESTED RIGHT in the office, of which he cannot be deprived but for cause, by due process of law. The fact that his name was stricken from the list of registered voters, after his election and induction into the office, is not alone sufficient cause to deprive him of it. *Id.*
3. JUDICIAL ACTION IS ADJUDICATION UPON RIGHTS OF PARTIES who in general appear or are brought before the tribunal by notice or process, and upon whose claims some decision or judgment is rendered. *Saline County Subscription, In re*, 337.
4. IN APPROVING BOND OF SHERIFF, COUNTY COURT ACTS in a ministerial and not in a judicial capacity. *Id.*

See QUO WARRANTO.

PARTITION.

1. IN ACTION FOR PARTITION OF REAL PROPERTY, SUMMONS ADDRESSED "TO THE ABOVE-NAMED DEFENDANTS" is a sufficient compliance with the requirements of the Minnesota statute, where the names of the defendants are stated in the title of the case in the summons, and the complaint alleges that the defendants named are the only persons, except the plaintiffs, having or claiming any interest in the property. *Martin v. Parker*, 188.
2. DECREE IN SUIT FOR PARTITION DIRECTING SALE of the property, instead of setting it off to one of the co-tenants upon his paying to the other the value of his interest, is proper. *Horton v. Maffitt*, 222.

See CO-TENANCY.

PARTNERSHIP.

1. MERE PAYMENT, OR PROMISE TO PAY, OUT OF PROFITS OF BUSINESS ENTERPRISE a sum of money as a specific proportion of the profits does not necessarily constitute the payee a partner, and gives him no interest in the profits or right thereto, but only a personal claim for such share thereof after they are ascertained and may be divided. *Chapline v. Conant*, 766.
2. ONE WHO HAS NOT BEEN HELD OUT AS PARTNER CANNOT BE CHARGEABLE as such, unless he has some ownership in or control over the profits as they accrue, and are not ascertained or divided into portions or dividends. *Id.*
3. AGREEMENT IN PARTICULAR CASE CONSTRUED, and held not to constitute a partnership. *Id.*
4. WHERE PARTIES ARE, OR ASSUME TO BE, PARTNERS, and jointly interested in the subject-matter in suit, declarations made by one relating thereto is evidence against both. *Simons v. Vulcan Oil & M. Co.*, 623.
5. IN ACTIONS UPON PARTNERSHIP CONTRACTS, all partners ought to be made defendants, as a general rule; but the omission to do so can only be taken advantage of by plea in abatement. In default of such plea, a joint contract may be offered in evidence in support of the separate contract declared on. *Smith v. Cooke*, 58.

See AGENCY, 5.

PAYMENT.

1. MONEY PAID UNDER MISTAKE OF FACT MAY BE RECOVERED BACK, although at the time the payment was made the plaintiff might have ascertained

the truth by the exercise of proper vigilance and care, and although the defendant cannot be restored to his original position upon paying back the money. *Kingston Bank v. Eltinge*, 516.

2. **CONFEDERATE NOTES, PAYMENT IN, UNDER DURESS.** — In the year 1864 the county of Greenbrier was under the domination of the so-called Confederate States government. Treasury notes of said government were tendered in payment of a bond to a creditor who was loyal to the Union, and had not demanded the debt, and he refused to accept them. He was then told that he was "obliged to take them under the laws of the confederate government." *Held*, that the payment was void, as made and received under duress *per minas*. *Mann v. Lewis*, 747.
 3. **DEBTOR DOES NOT SATISFY HIS DEBT BY GIVING HIS OWN NOTES**, payable at a future day. If the new notes are not paid, whether valid or usurious, the creditor may proceed upon and recover for the original indebtedness, as if such notes had not been given, surrendering them on the trial. *Winsted Bank v. Webb*, 435.
 4. **USURIOUS EXTENSION OF TIME OF PAYMENT** of valid debt does not impair the creditor's right to recover therefor. The surrender and cancellation of a security will not operate as a bar to a recovery, unless the intent of the transaction was to release or discharge the indebtedness. *Id.*
- See ATTORNEY AND CLIENT. 1, 2; NEGOTIABLE INSTRUMENTS, 13, 15; RELEASE.

PLEADING AND PRACTICE.

1. **THAT PARTY IS SUED BY WRONG NAME IS MATTER OF DEFENSE IN ABATEMENT**, and is waived by a failure so to plead the misnomer, whether the defendant appears or makes default. *First Nat. Bank of Baltimore v. Jagers*, 53.
2. **NOTWITHSTANDING MISNOMER OF DEFENDANT**, if the writ is served on the party intended to be sued, and he fails to appear and plead in abatement, and suffers judgment by default, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments. *Id.*
3. **TWO OR MORE DEFENSES ARE INCONSISTENT** only when proof of one necessarily disproves the other. The facts should be so set out that both defenses may be true. *Nelson v. Brodhack*, 328.
4. **SPECIAL DEFENSE IS NOT NECESSARILY INCONSISTENT** with a denial; it is only inconsistent when there is an absolute incompatibility of facts. *Id.*
5. **AMENDMENT WHEN ALLOWED.** — If facts are developed upon the trial that will enable the defendant to impeach the transaction upon which suit is based, or if he is taken by surprise by these facts, or if other facts have come to his knowledge since making up the issues, or if any other good excuse can be given for not having made them up, so as to admit desired testimony, he should be permitted to amend. But this is a matter of discretion with the court, and will be presumed to have been soundly exercised until the contrary is shown. *Allen v. Ranson*, 282.
6. **PARTY CANNOT DECLARE UPON ONE CAUSE OF ACTION** and recover upon another; but the variance between allegations and proof, to be fatal, must be such as to mislead the adverse party to his prejudice in maintaining his action or defense upon its merits. *Murphy v. Wilson*, 290.
7. **WHEN FACTS PROVED, AND NOT EVIDENCE MERELY, ARE CERTIFIED**, it may be that the appellate court should draw its own conclusions from them,

- uninfluenced by the opinion of jury: *Slaughter v. Tutz*, 12 Leigh, 147; but when the facts proved do not establish the ultimate facts, but they are to be deduced by balancing the different facts proved, and by weighing and comparing the inferences to be drawn from them, respect should be paid to the verdict and judgment in the court below. *Richmond etc. R. R. Co. v. Sneed*, 670.
8. INSTRUCTION IS PRACTICALLY REFUSED which is not marked by the court as either given or refused. *Vastins v. Wilding*, 347.
 9. NO MATERIAL FACT CAN BE SUPPOSED TO HAVE BEEN OMITTED FROM BILL OF EXCEPTIONS, where it is certified that "the foregoing is all the evidence material in the cause." *Bloss v. Phymale*, 752.

PLEDGE.

See NEGOTIABLE INSTRUMENTS, 12.

POSSESSION.

1. MERU POSSESSION OF ANOTHER'S PROPERTY IS NOT SUCH EVIDENCE OF OWNERSHIP or authority to sell that third persons have a right, as against the true owner, to rely thereon. *Sprights v. Hasoley*, 452.
2. POSSESSION OF CHATTEL IS NOT, AS IN CASE OF NEGOTIABLE PAPER OR MONEY, ASSURANCE OF TITLE, or authority to dispose of it. And he who assumes to deal or intermeddle with personal property not his own must see to it that he has a warrant therefor from some one who is authorized to give it. *Id.*

POWERS.

See AGENCY, 18.

PRESCRIPTION.

See ADVERSE POSSESSION.

PROCESS.

See BANKRUPTCY AND INSOLVENCY.

PUBLIC LANDS.

1. UNITED STATES DID NOT AND COULD NOT GIVE STATE OF MICHIGAN ANY CONTROL OVER PRIVATE PROPERTY, under 10 United States Statutes at Large, 35, granting the state a strip of land for canal purposes through the military reservation at Sault Ste. Marie. *Ryan v. Brown*, 154.
2. STATE CAN ONLY MAINTAIN PROPRIETARY RIGHTS OVER LANDS, upon proof of a valid grant, or legal appropriation upon an inquest in form of law. *Id.*
3. IN PENNSYLVANIA, STATE HAS NOT PARTED with the control of the waters of its navigable streams, nor of the soil beneath. *Stover v. Jack*, 566.
4. IN PENNSYLVANIA, GRANTS BY STATE of lands calling for a navigable stream as a boundary do not extend beyond low-water mark, and the grant is not absolute except to high-water mark. *Id.*
5. IN PENNSYLVANIA, GRANTS BY STATE of land bounded by a navigable stream gives the grantee only a qualified title to the space between high and low water mark. The right of passage over it in high water remains in the public. The state may use it for navigation purposes without compensation, and may protect it from an unauthorized use, even by the owner of the land, to low-water mark. *Id.*

6. ISLANDS IN NAVIGABLE STREAMS in Pennsylvania belong to the state, and are excepted from the general laws for the sale and settlement of vacant lands. They are granted under special laws. *Id.*

QUO WARRANTO.

INFORMATION IN NATURE OF QUO WARRANTO is essentially a civil proceeding, and the burden of proof is upon the complaining party to show that his adversary is illegally in possession of the office. *State v. Kupferle*, 265.

RAILROADS.

1. AGREEMENT TO GIVE RAILROAD COMPANY INTEREST IN CERTAIN LAND OF town lots, provided it would locate its station at a certain specified place, is void as against public policy. *Pacific R. R. Co. v. Seely*, 369.
2. RAILWAY STOCK SUBSCRIPTIONS, CONDITIONAL ON LOCATION OF LINE or station, are upheld, on the ground that this agreement, and not the stock itself, is conditional. *Id.*
3. RAILROAD COMPANY HAS NO AUTHORITY TO ACQUIRE LAND FOR PURPOSES OF SPECULATION under a grant of power to acquire and hold sufficient real estate for the construction of its road, and for the erection of depots, engine-houses, etc. *Id.*
4. IN ACTION BY OWNER OF LAND AGAINST RAILROAD COMPANY for damages in building their road, the jury may be properly instructed that they cannot compensate the plaintiff for risk of fire to his barn or its contents, nor hold the company responsible for anything that might be burned, nor for the risk of such burning. But if the proximity of the road to the building is such as to make danger from fire imminent, so that no man of common prudence would use it for the purpose of a barn, but would be driven from it and compelled to provide a barn elsewhere, then plaintiff is injured, and they must consider it in estimating the effect of the road upon the owner's property. *Wilmington etc. R. R. Co. v. Stauffer*, 574.
5. IN ESTIMATING DAMAGES ARISING FROM BUILDING RAILROAD upon private property, a comparison of its value at the time that the road was projected, and its value at the time of its completion, should be made, and while the jury cannot compensate for risk from fire, still the effect which the proximity of the road to a barn would produce upon the market value of the property is a proper subject for compensation. *Id.*
6. IN ASSESSING DAMAGES FOR CONSTRUCTION OF RAILROAD across private property, injury from proximity of buildings, interruption to their ordinary use of the avenues of passage, inconvenience caused by embankments and cuts, and such matters, are proper subjects for consideration in estimating the depreciation of the value of the property as a whole. *Id.*
7. IN DETERMINING DAMAGES AGAINST RAILROAD for building their road upon private property in Pennsylvania, every agency which works an injury or depreciates its value, recognized by the common law, should be taken into consideration, if they are the direct and immediate consequence of the construction of the road. *Id.*

See CERTIORARI, 2; CORPORATIONS, 11, 12; NEGLIGENCE.

RECORDS.

See COURTS.

REFEREES.

IT WILL BE PRESUMED BY COURT OF APPEALS, IN SUPPORT OF JUDGMENT OF REFEREE, that he found such facts, in addition to those specified in his report, as are essential to sustain his conclusion, provided there was evidence to warrant the finding of such additional facts. *Valentine v. Conner*, 476.

RELEASE.

1. "RELEASE OF ALL DEMANDS discharges all sorts of actions, rights, and titles, conditions before or after breach, executions, appeals, rents, covenants, annuities, contracts, recognizances, statutes, commons," etc. *Grumley v. Webb*, 304.
2. GENERAL WORDS in a release, following a particular recital, are qualified by and limited to such recital. *Id*

REMOVAL OF CAUSES.

REMOVAL OF CAUSE, STATUTORY PROVISIONS RELATIVE TO. — Act of Congress, March 2, 1867, providing for the removal of a cause from a state to a federal court, where either party believes he will not obtain justice in the state court, because of prejudice, etc., merely extends the privilege of removal to the plaintiff as well as to the defendant, and does not repeal the previous act of July, 1866, providing for such removal in cases of citizenship of different states, on the petition of the defendant, etc. *Washington etc. R. R. Co. v. Alexandria etc. R. R. Co.*, 710.

REFLEVIN.

ACTION OF REFLEVIN IS ALWAYS IN DETINET, under the statute of Michigan, whether the taking be wrongful or not; and where the taking is wrongful, and the plaintiff establishes his right to the property, the action cannot be defeated by a failure to make a prior demand. *Le Roy v. East Saginaw City R'y*, 162.

See TAXATION, 5, 6.

RESCISSION.

See CONTRACTS, 15.

RESTRAINT OF TRADE.

See CONTRACTS, 9-11.

RIOT.

See CORPORATIONS, 9.

RIPARIAN RIGHTS.

See WATERS.

SALES.

1. AS BETWEEN SELLER AND BUYER, if anything remains to be done before the goods are to be delivered, a present right of property does not attach in the buyer. But separation is enough to pass the property, though weighing, measuring, or counting may afterwards be necessary to adjust and determine the final amount of the price. *Southwestern Freight etc. Co. v. Stunard*, 255.

2. **WHEN NOTHING IS SAID, AND NO TIME STIPULATED AS TO PAYMENT**, sale is understood to be for cash, and the payment and delivery are concurrent acts, and the vendor may refuse to deliver without payment; and if payment is not made immediately, the sale becomes void. *Id.*
3. **IN CASE OF SALE WHERE TITLE HAS PASSED**, and the goods have been constructively delivered, possession cannot be coerced until payment is made, for as long as the vendor retains and has not surrendered possession, his lien exists; and though there may be a delivery which will pass the title, it will not necessarily destroy the lien. *Id.*
4. **UNLESS CREDIT IN SALE IS EXPRESSLY GIVEN**, which is a waiver of any right to demand immediate payment, the vendor's lien continues to exist; and if the buyer is insolvent when he demands delivery, the seller may refuse to deliver, even when credit has been given. *Id.*
5. **IN DOUBTFUL CASES OF SALE, QUESTION OF DELIVERY** and acceptance is for the jury under proper instructions. But where the facts are clear and undisputed, that question, and what will amount to a waiver of the vendor's lien, is for the court. *Id.*
6. **FACT THAT PARTY OBTAINING GOODS IS DEBITED WITH THEM ON BOOKS OF VENDOR** is not conclusive evidence that credit was given to him, but only a strong circumstance to be submitted, with all the other evidence in the cause, to the jury. *Myer v. Grafflin*, 66.
7. **WARRANTY OF TITLE IS IMPLIED** in a sale of personal property in the possession of the vendor. *Burt v. Dewey*, 482.
8. **VENDOR OF CHATTEL CAN RECOVER NOMINAL DAMAGES ONLY FOR BREACH OF IMPLIED WARRANTY OF TITLE**, where a judgment for the value of the chattel is recovered against him by the true owner, but the judgment is not satisfied. *Id.*
9. **WHERE VENDOR OF CHATTEL IS NOT IN POSSESSION AT TIME OF SALE, WARRANTY OF TITLE IS NOT IMPLIED**, and his subsequent acquisition of a good title will not inure to the benefit of the vendee. But where the vendor is, at the time, in the possession of the thing sold, he is held to an implied warranty of title. *Scranton v. Clark*, 430.
10. **SELLER WHO WARRANTS THING SOLD AS FIT FOR CERTAIN PURPOSE IS LIABLE** for any injury sustained by the buyer, in consequence of its unfitness; and the measure of damages is not simply the difference in value between the article contracted for and the article received. *Milburn v. Belloni*, 403.
11. **NO TITLE CAN PASS THROUGH THIEF**. Those who buy of him should be compelled to give up the property, unless they have converted it, when they should be held for its value. Factors and agents should be held to the same accountability. *Koch v. Branch*, 324.
12. **WHERE PARTIES TO CONTRACT FOR SALE OF WHEAT AGREE UPON PERSON TO INSPECT** and grade it, and that if, upon inspection by him, any of it should prove to be inferior to No. 1, the seller should pay the difference in value, it being left with the purchaser to call on the inspector if he considered any wheat of an inferior grade, the purchaser can only be allowed damages on account of the inferior quality of the wheat which he had inspected according to the contract. *Brackets v. Edgerton*, 211.
13. **PLAINTIFF IN ACTION FOR BREACH OF CONTRACT TO DELIVER WHEAT IS NOT ENTITLED TO INTEREST** from the date of the contract, but only from the time of its breach. *Id.*

See AUCTIONS.

SET-OFF.

1. IN EQUITY, AS AT LAW, SET-OFF IS ONLY ALLOWED where there is a mutuality in the demands, and the amounts are liquidated and certain. *Smith v. Washington Gas Light Co.*, 49.
2. MERE CLAIM OF UNLIQUIDATED AND UNCERTAIN DAMAGES CANNOT BE SET OFF against an undisputed judgment. *Id.*
3. TO AUTHORIZE SET-OFF, the debts must be between the parties in their own rights, and must be of the same kind or quality, and be clearly ascertained or liquidated. *Id.*
4. SET-OFF, WANT OF JURISDICTION TO ENFORCE. — The plaintiff was located and doing business in Washington City, and recovered judgment in a court of Baltimore. The defendant had a claim for damages growing out of the same transaction. *Held*, that the mere fact that the plaintiff was a non-resident of Baltimore did not give the court of equity of that city jurisdiction to restrain the judgment against the defendant, and to enforce a set-off. *Id.*

SHERIFFS.

See EXECUTIONS; OFFICE AND OFFICERS, 2, 4.

SHIPPING.

1. OWNER OF VESSEL WHO IS ALSO CARRIER HAS LIEN UPON GOODS FOR THEIR TRANSPORTATION, but it does not follow that he who has the title to the property employed in the transportation is necessarily the owner for the voyage. The owner of a vessel may lease it, give up all possession and control, reserving only rent, and in that case the lessee, although the lease assumes the form of a charter-party, becomes the owner for the term. *Ames v. Homeyer*, 391.
2. GENERAL OWNER MAY LET HIS SHIP WITH MASTER AND CREW OF HIS OWN CHOOSING, and if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint the master to control and navigate clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agents for the use of the charterer. *Id.*
3. WHATEVER AGREEMENT EXISTS BETWEEN CONSIGNEES OF CARGO AND CHARTERER OF VESSEL, FOR APPROPRIATION OF RETURN FREIGHTS, the right of the master to collect them from the consignees after delivery to them of the goods, at least to the amount due on the charter-party, cannot be questioned. The delivery of the goods to the consignees, and their acceptance of them under the bill of lading, raises an *assumpsit* against them to pay freights according to the stipulations of the bill of lading; and this implied obligation becomes a positive one when the goods are received with notice that the freights must be paid to the master, and not to the charterer. *Id.*

See COMMON CARRIERS.

SLANDER.

WHEN SLANDER IS IN FOREIGN LANGUAGE, it is necessary in an action for damage to prove that the hearers understood the language. This rule does not apply to a libel in a foreign language. *Palmer v. Harris*, 567.

SOVEREIGNTY.

1. STATE CAN NEITHER BE SUED NOR BE INDICTED; but such immunity does not pass to the vendees of her property or rights. *Delaware Division Canal Co. v. Commonwealth*, 570.
2. RIGHT TO CONTROL DISPOSAL OF PROPERTY is fundamental, but must be so regulated as not to conflict with high public interests. *Dobson v. Ball*, 586.

SPECIFIC PERFORMANCE.

CONTRACT BY HUSBAND AND WIFE TO SELL LAND—SPECIFIC PERFORMANCE. — Husband and wife contracted in writing to sell certain real estate belonging to the wife, and the wife's separate acknowledgment was taken to the agreement: *held*, that a court of equity had jurisdiction to entertain a bill by the vendee for specific performance. *Dunkel v. Hunter*, 651.

STATUTE OF FRAUDS.

1. PROMISE MADE TO DEBTOR TO ANSWER FOR HIS DEBT TO ANOTHER is not within the statute of frauds. *Goetz v. Foss*, 218.
2. CONTRACT REQUIRED BY STATUTE OF FRAUDS TO BE IN WRITING CANNOT BE SUBSEQUENTLY MODIFIED BY PAROL; and where the time of performance is fixed by such contract, there can, therefore, be no inquiry concerning a reasonable time for performance. *Abell v. Munson*, 165.
3. STATUTE OF FRAUDS—CONTRACT FOR SALE OF GROWING TIMBER. — The holder of a contract in writing for the sale of growing timber, absolute on its face, but accompanied by a parol defeasance, sold it to a *bona fide* purchaser, without notice of the defeasance: *held*, that such purchaser took a full title. *Pattison's Appeal*, 637.
4. CONTRACT FOR STANDING TIMBER TO BE TAKEN OFF LAND AT DISCRETION AS TO TIME IS INTEREST IN LAND, within the statute of frauds, the transmission of which must be in writing. *Id.*

STATUTE OF LIMITATIONS.

1. JUDGMENT MAY BE RECOVERED AGAINST ONE OR MORE JOINT CONTRACTORS, although the statute of limitations has barred the action against the others. *Town v. Washburn*, 219.
2. PART PAYMENT OF JOINT DEBT BY ONE of the joint debtors, before the debt is barred by the statute of limitations, will take the debt out of the operation of the statute as to the other joint debtor. *McClury v. Howard*, 378.
3. IN EJECTMENT, PLEA OF STATUTE OF LIMITATIONS is not required to entitle defendant to its benefits. The necessity of pleading it depends upon its effect, whether it merely suspends the remedy or vests the absolute title in defendant. If the latter, there is no more necessity of pleading it than if he held plaintiff's title. *Nelson v. Brodback*, 328.

SUBSCRIPTION.

See CORPORATIONS.

SUPPLEMENTARY PROCEEDINGS.

See CONTEMPT.

SURETYSHIP.

TO ASCERTAIN WHETHER UNDERTAKING TO PAY DEBT OF ANOTHER BE COLLATERAL OR ORIGINAL, the point of inquiry is, To whom was the credit given at the time of the sale and delivery of the goods? And this is a question for the jury. *Myer v. Grafflin*, 66.

TAXATION.

1. **TAX ASSESSMENTS OUGHT NOT TO BE VACATED,** and property liable to taxation released altogether, because the public officers have not strictly followed the provisions of the law, which are merely directory. And a court of equity cannot interfere for such cause to relieve a party from the payment of taxes assessed upon his property by the proper authority. *Stoddert v. Ward*, 83.
2. **CHANGE OF DOMICILE, SO FAR AS IT RESPECTS QUESTION OF TAXATION,** cannot be effected by intention alone, and without actual removal. *Id.*
3. **PERSON IS LIABLE TO TAXATION AS CITIZEN OF CERTAIN COUNTY SO LONG** as he continues in fact to reside in such county; and the levy of the year being completed while he so continues to reside in the county, and before he removes therefrom, he is chargeable with the taxes assessed for that year. *Id.*
4. **CORPORATION IS EXEMPT FROM ALL OTHER TAXES,** where, by the laws under which it is incorporated, it is required to pay a certain annual specific tax on its paid-in capital, to be "in lieu of all other taxes upon all the property of said company." *Le Roy v. East Saginaw City Ry*, 162.
5. **STATUTE OF MICHIGAN PROVIDING THAT NO REPLEVIN SHALL LIE** for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine, in pursuance of any law of this state, must be construed as applying only to cases in which a valid tax might, by legal possibility, have been imposed and collected by regular and proper proceeding under some statute authority. *Id.*
6. **TAX WARRANT, REGULAR ON ITS FACE, WILL NOT AFFORD TAX COLLECTOR PROTECTION** in an action of replevin for property levied upon and taken by him to satisfy unauthorized taxes, although it would protect him from personal responsibility as a trespasser or wrong-doer. *Id.*
7. **PARTY CLAIMING UNDER TAX DEED MUST SHOW THAT LAND HAD NOT BEEN REDEEMED** when such deed was made, before it can be received as *prima facie* evidence of title, under the Minnesota statute. *Greer v. Coffin*, 229.
8. **CHARGING LAND ON TAX LIST IN NAME OF PERSON OTHER THAN TRUE OWNER** invalidates the tax sale, unless the land be otherwise correctly described, and the taxes be due and unpaid at the time of the sale. *Id.*

TORTS.

See DAMAGES.

TRADE-MARKS.

1. **TRADE-MARK — DEFENSE.** — Fact that party in another state manufactured articles and put them upon the market to compete with plaintiffs using his trade-mark is no defense for a third party whom plaintiff seeks to enjoin from using his trade-mark, unless plaintiff assented to or acquiesced in such infringement on his right. In other words, the depreda-

- tions of others upon plaintiff's rights is no excuse to defendant for similar acts on his part. *Filley v. Fassett*, 275.
2. **DISPUTED TRADE-MARK CANNOT BE APPROPRIATED** by filling in the recorder's office a written claim thereto, although the original claimant had never filed such document for registration. *Id.*
 3. **MISSOURI STATUTE WAS NOT DESIGNED TO WEAKEN OR ABRIDGE** any existing rights, or any future right, to a trade-mark which might be acquired, or to legalize, in any form or measure, piracy in trade-marks. *Id.*
 4. **MISSOURI STATUTE REQUIRING REGISTRATION OF TRADE-MARKS** has no application to articles made in another state. *Id.*
 5. **MISSOURI STATUTE WILL NOT WARRANT APPROPRIATION OF EXISTING TRADE-MARK** by one party, when the ownership and title to it is in another. *Id.*
 6. **TRADE-MARK MAY CONSIST OF ANY CONTRIVANCE**, design, name, symbol, or other thing, which is adapted to accomplish the object proposed by it, namely, to point out the true source and origin of the article to which the mark is applied, or to point out and designate the dealer's place of business, distinguishing it from the business locality of other dealers. *Id.*
 7. **TRADE-MARK MUST POINT OUT SOURCE AND ORIGIN** of the goods, and not be merely descriptive of the style, quality, or character of them. *Id.*
 8. **BY ADOPTION AND USE OF TRADE-MARK**, the party claiming it acquires a property interest therein which the courts will protect. *Id.*
 9. **WHEN PLAINTIFF'S ARTICLE IS NOT CONSPICUOUSLY KNOWN** by the device which surrounds the name, the whole of which constitutes the trade-mark, but by the name itself, the adoption of such name for an article manufactured by another is an infringement of the former's right, for if the name as used was calculated to mislead, the intention to deceive is inferred. *Id.*
 10. **IMITATION OF TRADE-MARK TO CONSTITUTE INFRINGEMENT** need not be exact or perfect. It may be limited or partial, nor is it requisite that the whole should be pirated, nor is it necessary to show that any one has in fact been deceived, or that the party complained of made the article; nor is it necessary to show intentional fraud; and if the court sees that plaintiff's trade-mark is simulated in such manner as to deceive patrons of his business, the piracy will be checked by injunction. *Id.*
 11. **USE OF TRADE-MARK WILL NOT BE RESTRAINED**, unless it so closely resembles that of the complainant as to raise the probability of mistake on the part of the public, or of design and purpose on the part of the defendant to mislead and deceive. *McCartney v. Garnhart*, 397.
 12. **EQUITY WILL RESTRAIN BY INJUNCTION** the counterfeiting of trade-marks, for the purpose of promoting honesty and fair dealing, and because no one has the right to sell his own goods as the goods of another. *Palmer v. Harris*, 557.
 13. **PARTY IS NOT ENTITLED TO INJUNCTION** to secure the profits arising from the fraudulent use of a trade-mark bearing on its face a falsehood as to the place where the goods are manufactured, and where, in order to have the benefit of the reputation which such goods have acquired in the market, he is guilty of the same fraud which he complains of in defendant. *Id.*
 14. **FOR EQUITY TO REFUSE TO ENJOIN** the counterfeiting of a fraudulent trade-mark, it is not necessary that any person has been actually deceived or defrauded; it is enough that it is a misrepresentation calculated to have that effect on the unwary and unsuspicious. *Id.*

TRESPASS.

1. ACTION OF TRESPASS QUARE CLAUSUM FREIGHT CANNOT BE REVIVED in the name of the personal representative of one of the joint plaintiffs, who died pending the action and before verdict. But such revival, if by consent, in the name of the sole devisee of the decedent, cannot afterwards be objected to by either of the parties consenting. *Tompkins v. Fitzroux*, 735.
2. EQUITY HAS JURISDICTION TO RESTRAIN TRESPASS calculated to do permanent damage to the freehold; and where it is an act of official oppression by public officers and agents, under color of office, a less grievance constitutes a ground for interference than where the trespass is by a private person. *Ryan v. Brown*, 154.
3. PARTY INJURED BY CO-TRESPASSERS MAY SUE EITHER ONE against whom the action may be brought. He is not bound to prosecute all, and neither the omission to sue all, nor if all are sued the dismissal of one of them from the suit, can be pleaded by the others in bar. *Bloss v. Phymale*, 752.
4. ABSOLUTE RELEASE OF ONE JOINT TRESPASSER DISCHARGES ALL THE REST who participated in the act. But to have this effect, it must be a technical release, under seal, expressly stating the cause of action to be discharged without conditions or exceptions. No release will be allowed by implication. *Id.*
5. WHERE CAUSE OF ACTION EXISTS AGAINST ALLEGED JOINT TRESPASSERS, PLAINTIFF MAY SUE ALL or either of them, at his election, and is entitled to full, but to only one, satisfaction; and if the damages have been in part satisfied by payment or compromise with some of the defendants, the plaintiff may still proceed against those who remain on the record. Evidence of a sum received by the plaintiff from one of the defendants, on account of the alleged trespass, is, therefore, admissible in mitigation of damages. *Id.*
6. TRESPASS — ESTOPPEL BY PLEA OF "NOT GUILTY." — An action of trespass was brought against several defendants. As to one of them, Jarrell, the case was dismissed by the plaintiff without trial and before plea. He also dismissed the case as to three other defendants before trial. The defendants pleaded "not guilty," and also accord and satisfaction to Jarrell, who was alleged in the plea to be a joint trespasser, and on the trial they offered in evidence the summons and declaration. *Held*, that it was not error to permit the declaration and orders of dismissal to go in evidence, for they were parts of the record; but that the plea of "not guilty" estopped the remaining defendants from using the allegations of the declaration to prove that the released defendant, Jarrell, was a joint trespasser. *Id.*

TROVER.

1. IN ACTION OF TROVER, WHEN NEITHER PARTY HAS TITLE to the property, the defendant may show title in a third person, under whom he does not claim, in order to defeat the plaintiff's action. *Smoot v. Cook*, 741.
2. POSSESSION OF PERSONAL PROPERTY IS PRIMA FACIE EVIDENCE OF TITLE; and if the defendant in trover had possession after the plaintiff had possession of the same property, such possession is sufficient evidence of title to sustain his defense until the plaintiff should prove title. *Id.*
3. ADMINISTRATRIX MAY MAINTAIN TROVER FOR CONVERSION OF CERTIFICATE OF STOCK AGAINST ONE WHO RECEIVED IT FROM HEIR, as security for

a debt, where, after the death of the intestate owning the certificate, and before the appointment of the widow as administratrix, the widow and heirs indorsed it, and caused it to be sent by one of the heirs to a certain person for sale, and subsequently such heir, without the assent of the widow and the other heirs, made an agreement to pledge it as security for a debt which he owed, and gave an order on the custodian of the certificate for its delivery to the creditor, who supposed the heir owned it, and who obtained it and sold it. *Morton v. Preston*, 146.

4. ONE WHO CONVERTS CERTIFICATE OF STOCK MUST BE REGARDED AS HAVING CONVERTED SHARES which the certificate represents, so that he cannot claim to be liable only for nominal damages for such conversion. *Id.*

See AGENCY, 15, 16.

TRUSTS.

1. TRUSTS ARE EITHER SIMPLE OR SPECIAL; in the former, the trustee is passive and performs no duty, and the trust is purely technical; in the latter he is active, being an agent to execute the donor's will, and the trust is operative. *Dobson v. Ball*, 586.
2. SIMPLE TRUST GIVES TO CESTUI QUE TRUST a right to the possession, control, and disposal of the property, and the legal estate becomes executed in him, unless it is necessary to remain in the trustee, to preserve the estate for the *cestui que trust*, or to pass it to others. *Id.*
3. SPECIAL TRUST MAINTAINS LEGAL ESTATE in the trustee, to enable him to perform the duties devolved on him by the donor, and gives the *cestui que trust* only a right in equity to enforce the performance of the trust. *Id.*
4. SIMPLE OR PASSIVE TRUST CANNOT CONTINUE the legal estate in the trustee, except for a proper and useful purpose, such as the law will protect; and as soon as the purpose fails or ceases to exist, the legal estate becomes executed in the *cestui que trust*. *Id.*
5. EQUITY PRESERVES SPECIAL TRUST TO GIVE EFFECT TO DONOR'S RIGHT OF DOMINION over his property; as to a passive trust it permits it to fall in favor of public policy. *Id.*
6. TRUST DIFFERS ESSENTIALLY FROM CONTRACT, and will be enforced when the latter cannot. *Crawford's Appeal*, 609.
7. RELATION OF TRUSTEE AND CESTUI QUE TRUST IS USUALLY, as well in fact as in law, a relation of personal trust and confidence. *Tull v. Davis*, 385.
8. TRUSTEES ARE INCAPABLE OF PURCHASING TRUST PROPERTY for themselves. *Grumley v. Webb*, 304.
9. CONDUCT OF TRUSTEES IN MANAGEMENT AND DISPOSITION OF TRUST PROPERTY must be regulated and controlled by the provisions and conditions of the deed of trust. And trustees accepting the trust, upon the terms and conditions creating it, have no power to alter, change, or dispense with those terms and conditions. *Hunt v. Townshend*, 63.
10. WHERE DEED OF TRUST MINUTELY PRESCRIBES the circumstances under which, and the manner in which, the trustees may dispose of the trust property, they are not at liberty to dispose of it in any other manner. If they voluntarily confess judgment, contrary to the provisions of the trust deed, such judgment is not a lien upon the trust property, and can only bind the individual property of the parties confessing it. *Id.*
11. TRUSTEE, SUBSTITUTION OF, TO FILL VACANCY. — A railroad company's deed of trust of its property, made to secure certain bonds, provided

that if the trustee should become incapable of acting, any court of record of a certain county, upon application of three fifths of the bondholders, and notice to the president or any director of the company, might appoint another trustee. The trustee, president, and directors went into the enemy's lines, and remained there during the war of the Rebellion. *Held*, that an order of the county court, substituting another person as trustee, without notice, and a sale by such substituted trustee, were utterly void. *Washington etc. R. R. Co. v. Alexandria etc. R. R. Co.*, 710.

12. TRUSTEE IN DEED TO SECURE DEBTS, WHO IS ATTORNEY AT LAW AND IN FACT OF CREDITOR, cannot make a valid sale of the property to himself. *Id.*
13. ONE ENABLED TO BID IN PROPERTY AT LESS THAN ITS VALUE, by falsely representing that he is acting for or in the interest of the defendant in execution, will be converted into a trustee for the benefit of such defendant. *Grumley v. Webb*, 304.
14. PAROL PROOF OF FACTS AND CIRCUMSTANCES IS ADMISSIBLE IN EQUITY to establish resulting trusts. *Dryden v. Hamway*, 61.
15. RESULTING TRUST — DEED ABSOLUTE TREATED AS MORTGAGE. — D. was the purchaser, in his own name, of a house and lot, but not having the money to pay therefor, H., who was his brother-in-law, advanced the money, and for his security was reported to the orphans' court, by the executors who made the sale, as the purchaser, and took the conveyance in his own name, upon payment of the purchase-money. On a bill filed by D. to have the deed to H. declared to be only a mortgage as between himself and H., *held*, that the facts fully established a resulting trust, which a court of equity would recognize; and that the deed to H. must be treated as a mortgage between the parties. *Id.*
16. WHERE UNMARRIED WOMAN CONVEYED HER ESTATE in trust for her separate use during life, without control from any husband, and on her death to be conveyed to persons named by will, or, in absence of appointment, to those to whom it would descend if she had died owning it in fee-simple, and she married and afterwards became discoverd, it was held that the trust thereupon failed. *Dobson v. Ball*, 586.

See AGENCY, 17; AUCTIONS; CORPORATIONS; CONTRACTS; ESTATES; EXECUTORS AND ADMINISTRATORS.

USAGES AND CUSTOMS.

1. CONTRACT IS GENERALLY LAW OF TRANSACTION IN WHICH IT EXISTS, and is not to be affected by anything but its terms, yet in many cases its execution may be curtailed by usage or custom. *Helme v. Philadelphia L. Ins. Co.*, 621.
2. GENERAL RULE IS, THAT CUSTOM MAY NOT BE HEARD TO AFFECT TERMS OF STATUTE, nor a contract, to the extent of enlarging or abridging the force of it, yet it may interpret either. *Id.*
3. EVIDENCE INTRODUCED TO ESTABLISH GENERAL CUSTOM, but which consists of individual opinions, and the obligation which the witnesses should have deemed resting upon them under the circumstances in the case, is inadmissible. *Southwestern Freight etc. Co. v. Stanard*, 255.
4. CUSTOM MUST BE GENERAL, uniform, certain, and notorious, and to be binding on the parties must be directly known to them, or so general and universal in its character that knowledge may well be presumed. *Id.*

5. WHERE CONTRACT IS MADE AS TO MATTER ABOUT WHICH THERE IS CUSTOM well established, such custom is understood as forming part of the former, and may always be referred to for the purpose of showing the intention of the parties in all particulars not expressed in the contract. *Id.*
6. EVIDENCE OF CUSTOM IS NEVER ADMISSIBLE to oppose or alter a general principle or rule, or to make the rights and liabilities of parties other than they are at law. *Id.*

See INSURANCE, 4.

USURY.

LOAN IS NOT RENDERED PER SE USURIOUS from the fact that the lenders exacted, as a condition of making the loan, that the borrower should secure to them the payment of a subsisting and genuine debt due them from a third person. *Valentine v. Conner*, 476.

VENDOR AND VENDEE.

1. DECREE BY COURT OF EQUITY FOR DEED FROM ONE DEFENDANT TO ANOTHER, in a suit to enforce a vendor's lien, is not matter of which the plaintiff can complain, where the court also decided that he had no lien or right in the premises, and decreed costs against him. *Mann v. Lewis*, 747.
2. VENDOR WHO CONTRACTS TO SELL AND CONVEY LAND MUST RESPOND TO VENDEE IN DAMAGES, to the extent of the difference between the contract price and the value of the land at the time of the breach, where he has the title, and for any reason refuses to convey it, as required by the contract. *Per Mason, J. Pumpelly v. Phelps*, 463.
3. VENDOR WHO CONTRACTS TO SELL AND CONVEY LAND IS LIABLE TO VENDEE IN NOMINAL DAMAGES ONLY, for breach of contract, where he contracts in good faith, believing he has a good title, and afterwards, on discovering his title to be defective, for that reason refuses or is unable to fulfill his contract; but this rule should not in any degree be extended, but strictly limited to those cases coming exactly within it. *Per Mason, J. Id.*
4. VENDOR WHO CONTRACTS TO SELL AND CONVEY LAND MUST MAKE GOOD TO VENDEE LOSS OF BARGAIN, where he knows at the time that he had not the title or the power of conveyance, although he may have acted in good faith, and believed that he should be able to procure a good title for the vendee. *Id.*
5. VERBAL AGREEMENT TO RESCIND CONTRACT UNDER SEAL FOR SALE OF LAND, made after payments are due, and founded upon no new consideration, unless followed by an actual abandonment of the sale by both parties, and a restoration of the property, so far as possible, to the vendor, will be treated as invalid in a suit by the vendor for the stipulated purchase-money. *Pratt v. Morrow*, 381.
6. WHERE CONTRACT IS SOUGHT TO BE AVOIDED on the ground of fraud or failure of consideration, if any value appears to attach to defendant's title, a condition to reconvey in the verdict will do equity; and if after verdict it should appear that a reconveyance ought to be made, the court may restrain execution until it is made. *Babcock v. Case*, 654.

7. WHERE OWNER OF TAX TITLE TO LAND SELLS It representing it to be good, and the purchaser relies upon such representations, a relation of trust is created between the parties, which compels the vendor to exhibit the truth of the case as it exists whether he knows it or not; and his ignorance of the truth, having undertaken truly to state it, will not redeem a falsehood regarding the title, in any material matter, from being a fraud which will avoid the sale. *Id.*
8. EVIDENCE OF VALUE OF LAND SHORTLY AFTER IT SHOULD HAVE BEEN CONVEYED IS ADMISSIBLE to show what its value was at that time, in an action for breach of contract to convey. *Abell v. Muncson*, 165.

See AUCTIONS; DEEDS.

WAR.

1. WAR OPERATES AS INTERRUPTION OF ALL COMMERCIAL AND OTHER PACIFIC INTERCOURSE and communication with the public enemy; and every species of private contract made with subjects of the enemy during war is unlawful. *Billgerry v. Branch and Sons*, 879.
2. CHECK OR BILL OF EXCHANGE DRAWN BY CITIZEN OF ONE BELLIGERENT upon a citizen of the other during war is unlawful and void. *Id.*
3. LATE REBELLION WAS WAR, AND CITIZENS ON OPPOSITE SIDES WERE ALIEN ENEMIES, and their relations, under the constitution, were suspended and superseded for the time by new relations under the laws of war. *Id.*
4. INTERNATIONAL LAW APPLIED TO CONTRACTS AND TRANSACTIONS BETWEEN RESIDENTS within the limits of the Confederacy and residents in territory under federal authority. *Id.*
5. CHECK DRAWN AND INDORSED IN VIRGINIA DURING LATE CIVIL WAR upon a bank in New Orleans, while New Orleans was under the permanent possession and control of the federal forces, is void, and the contract of indorsement is void, though all the parties, except the New Orleans bank, were residents and citizens of the Confederate States. *Id.*

WAREHOUSEMEN.

WAREHOUSEMAN WHO RECEIVES WHEAT ON STORAGE, GIVING MEMORANDA stating that the wheat was No. 2 wheat, is not estopped from showing that the wheat delivered to him was not No. 2 wheat, nor from showing that he is entitled to discharge his contract by returning the same wheat that he received. And a purchaser to whom the owner of the wheat transferred the memoranda, and delivered written orders directing the warehouseman to deliver the wheat to the bearer, has no greater right, as against the warehouseman, than his vendor had. *Robson v. Swart*, 238.

WARRANTY.

See SALES.

WATERS.

1. OWNERSHIP OF LANDS UPON STREAM EXTENDS OVER ITS BED to the middle of the stream, unless clearly confined within less limits by the terms of

the grant; and the complete control of the use of such land covered with water is in the riparian owner, except so far as limited and qualified by such rights as belong to the public at large, to the navigation, and such other use, if any, as appertains to the public over the water. *Ryan v. Brown*, 154.

2. STREAMS ONLY WHICH ARE WHOLLY WITHIN STATE ARE REFERRED TO by article 18, section 4, of the Michigan constitution of 1850, which declares that "no navigable stream in this state shall be either bridged or dammed without authority from the board of supervisors of the proper county." *Id.*
3. SAULT STE. MARIE CANAL BOARD HAVE SUCH CONTROL OVER CANAL AND ITS APPROACHES as to be authorized to remove such obstructions as are unlawful; but they have no such judicial authority as to make their finding conclusive upon the fact of illegality, and if they interfere with private rights, they act at their peril, and are responsible for their conduct. *Id.*
4. ERECTIONS BY RIPARIAN OWNERS IN WATERS WHOSE BEDS ARE PUBLIC PROPERTY ARE UNLAWFUL, not because they are nuisances, in the proper sense of the term, but because they are encroachments on the public domain; but where the ownership is private, and the public rights are simply easements or privileges, the owner may use the beds as he pleases, so long as it does not injuriously affect the public enjoyment; and his use is *prima facie* lawful. *Id.*
5. EXTENT TO WHICH PRIVATE IMPROVEMENTS IN NATURAL WATERCOURSES IS COMPATIBLE WITH PUBLIC USE must depend upon circumstances, and always be a question of fact. *Id.*
6. RIGHT OF PUBLIC FOR PURPOSES OF NAVIGATION MUST BE APPURTENANT TO ORDINARY MEANS OF NAVIGATION; and it can, therefore, never be unlawful to erect such wharves and landings as will accommodate all vessels ordinarily using the stream, unless there are some exceptional circumstances which may render the structures improper. *Id.*
7. ERECTIONS IN RIVER AT HEAD OF NAVIGATION, AND SERVICEABLE TO NAVIGATION, DO NOT BECOME UNLAWFUL by the subsequent opening of a canal, which is in no sense a part of the river, but an independent waterway connecting the river above the falls with the stream below. *Id.*
8. RIPARIAN PROPRIETORS IN PENNSYLVANIA take to ordinary low-water mark unaffected by drought. *Stover v. Jacks*, 566.
9. ISLAND CUT OFF FROM MAINLAND BY NAVIGABLE STREAM in ordinary stages of low water cannot be added to the land of an adjacent owner merely because in very dry season the river almost disappears, and no water flows over the intervening dry, sandy, or pebbly bed. *Id.*
10. WHAT CONSTITUTES LOW-WATER MARK of navigable streams in Pennsylvania must be determined by the law of that state, and not by the law of England or sister states. *Id.*
11. AT COMMON LAW, ONLY THOSE STREAMS are navigable in which the tide ebbs and flows; as to them, low or high water mark is decided by the ebb and flow of the tide. But the common law being inapplicable in Pennsylvania, it has not been adopted. *Id.*
12. RIGHT TO TAKE FISH IS PROFIT A PRENDRE, and it requires for its use and enjoyment exclusive occupancy during the period of fishing, and implies the right to fix stakes and capstans for the purpose of drawing the seine, and the occupancy of the bank at high tide, as well as the space between

high and low water mark, as far as may be necessary and usual. *Tinicum Fishing Co. v. Carter*, 597.

13. SEVERAL AND EXCLUSIVE FISHERY IN NAVIGABLE RIVER CANNOT BE ACQUIRED BY PRESCRIPTION, in Pennsylvania, for no grant could have been made to support the right. *Id.*
14. PROPRIETARIES OF PENNSYLVANIA AND NEW JERSEY NEVER OWNED BED OF DELAWARE RIVER, but their respective grants extended only to low-water mark on either side; and the bed of the river and the river itself remained in the crown, and passed by force of the Revolution and of the treaty of peace to the two states, to be owned and enjoyed on the same principle as a navigable river flowing between two coterminous nations. *Id.*
15. SEVERAL AND EXCLUSIVE FISHERY IN DELAWARE RIVER, OPPOSITE ANY PART OF SHORE, whether by right of title to the soil, or derived by grant from the riparian owner, depends, in Pennsylvania, upon the acts of the assembly of 1804 and 1809; and no such fishery can be established in the river without proving a compliance with those acts. *Id.*

See PUBLIC LANDS.

WAYS.

UNDER GRANT OF PASSAGE-WAY, "AS NOW LAID OUT," OWNER OF LAND OVER WHICH WAY PASSES CANNOT MAINTAIN EASE THEREON, nor can he narrow the way by planting posts therein. *Welch v. Wilcox*, 113.

WILLS.

1. WILL DESTROYED BY TESTATOR HIMSELF IN HIS LIFETIME, ACTING UNDER FRAUDULENT AND UNDUE INFLUENCE, is a will "fraudulently destroyed," and may be admitted to probate on establishing facts showing the existence and due execution of the will, and its destruction by reason of such improper influence. *Voorhees v. Voorhees*, 458.
2. WORDS OF WILL, IN THEIR ORDINARY LEGAL SIGNIFICATION, must be taken to express the intention of the testator, unless there is something in the will, or circumstances *dehors* it, to indicate that they were used in a different sense, and all the circumstances may be resorted to to assist the construction. *Hoope's Appeal*, 562.
3. REQUESTS BY WILL, GIFTS, GRANTS, OR DONATIONS obtained from the ward by the guardian, from *cestui que trust* by trustee, from child by parent, or from client by attorney, are watched with great and jealous scrutiny, and generally held to be presumptively void and obtained through undue influence. *Garvin v. Williams*, 314.
4. REQUEST BY WILL FROM WARD TO GUARDIAN is presumed void, and will not be allowed to stand if the period between the making of the will and the coming of age of the ward is short, unless it is shown most satisfactorily, and beyond a reasonable doubt, that there exists the utmost good faith on the part of the guardian. *Id.*
5. WILL OF WARD IN FAVOR OF GUARDIAN PRESUMED INVALID. — Where it appeared that the devisee had been appointed the guardian of the testator when the latter was a child; that from the time of such appointment until his death he resided in the family of the guardian; that the latter had exclusive control and management of his estate, and his entire confidence; that just prior to arriving at age, a settlement was

had between them, and on the next day the ward made his will in favor of the guardian and his family, almost totally disinheriting his relatives; that at the time he was too ill to attend to business, and showed no interest in what was going on, and about a month afterwards died, — it was held that the will was presumptively void and the burden of proving its validity upon the beneficiaries under it. *Id.*

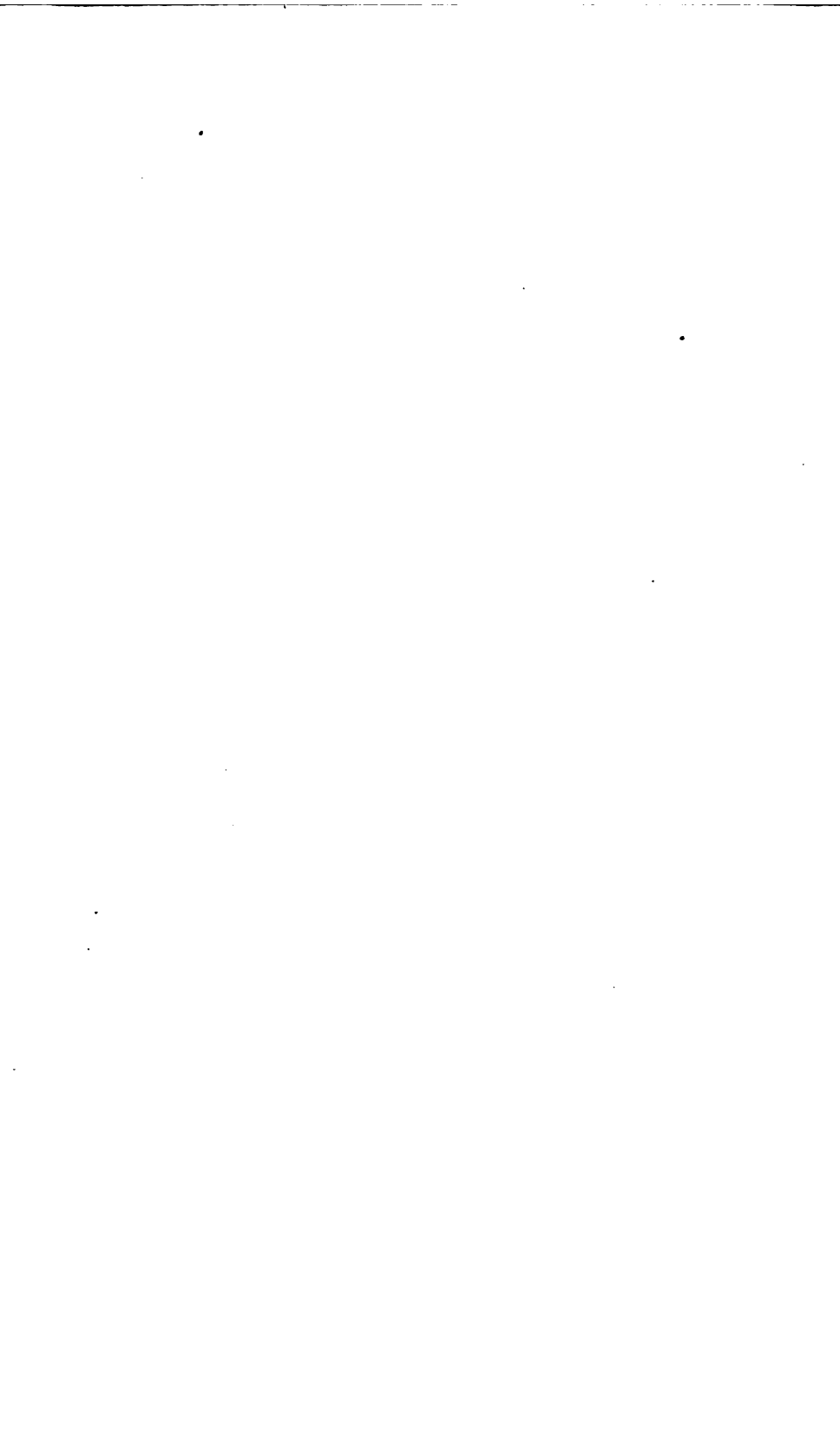
6. **BEQUEST IN WILL BY BOARDING-SCHOOL KEEPER** of household furniture will pass all such articles as are employed for the comfort or convenience of the boarders, as well as those used by members of the testator's family, or by guests entertained without pay. *Hoope's Appeal*, 562.
7. **SCHOOL-ROOM FURNITURE WILL NOT PASS IN WILL** of a boarding-school keeper as household furniture, though the testator may have lived in one of the rooms in the house used for school purposes. *Id.*
8. **ARTICLES OF TRADE IN STORE OR SHOP** of cabinet-maker, upholsterer, or other tradesman will not pass in his will as household furniture, though he may have lived in the same building, and the same rule applies to a hotel-keeper living in a different house. *Id.*
9. **DEVISE "TO THE PROPAGATION OF THE GOSPEL IN FOREIGN LANDS" IS VOID** for uncertainty in the devise. *Carpenter v. Miller*, 744.
10. **SECOND WILL INCONSISTENT WITH FIRST WILL, PERFECT IN ITS FORM AND EXECUTION**, but incapable of operating as a will on account of some circumstances *dehors* the instrument, may nevertheless be set up as a revocation of the first. *Id.*
11. **RULE OF CONSTRUCTION WHEN SECOND WILL IS SET UP TO REVOKE FIRST WILL** is, that where the words are imperative, though inoperative by reason of some incapacity in the devisee, they operate a revocation; and where the words are precatory, if the object of the language be certain and definite, the words are considered imperative, creating a trust for the purpose indicated, and operate a revocation. But whenever the prior dispositions of the property are complete, and the words are precatory, and their object uncertain and indefinite, the words will not be held to create a trust or be construed to revoke a former will. *Id.*
12. **WHEN TERMS OF LIMITATION IN WILL** can be fairly interpreted to mean "heirs" or "heirs of the body," an estate of inheritance will be presumed to have been intended by the testator. *Dobson v. Ball*, 586.
13. **WHEN INTENT OF TESTATOR SEEMS TO BE TO LIMIT ESTATE TO HEIRS** of the life tenant, no matter how the intent is expressed, an estate of inheritance will vest in the life tenant, but when he intends to vest his estate in certain persons, though they may be the same as the heirs at law, the life estate will not be enlarged, and a power of appointment, general or special, will not change the rule. *Id.*

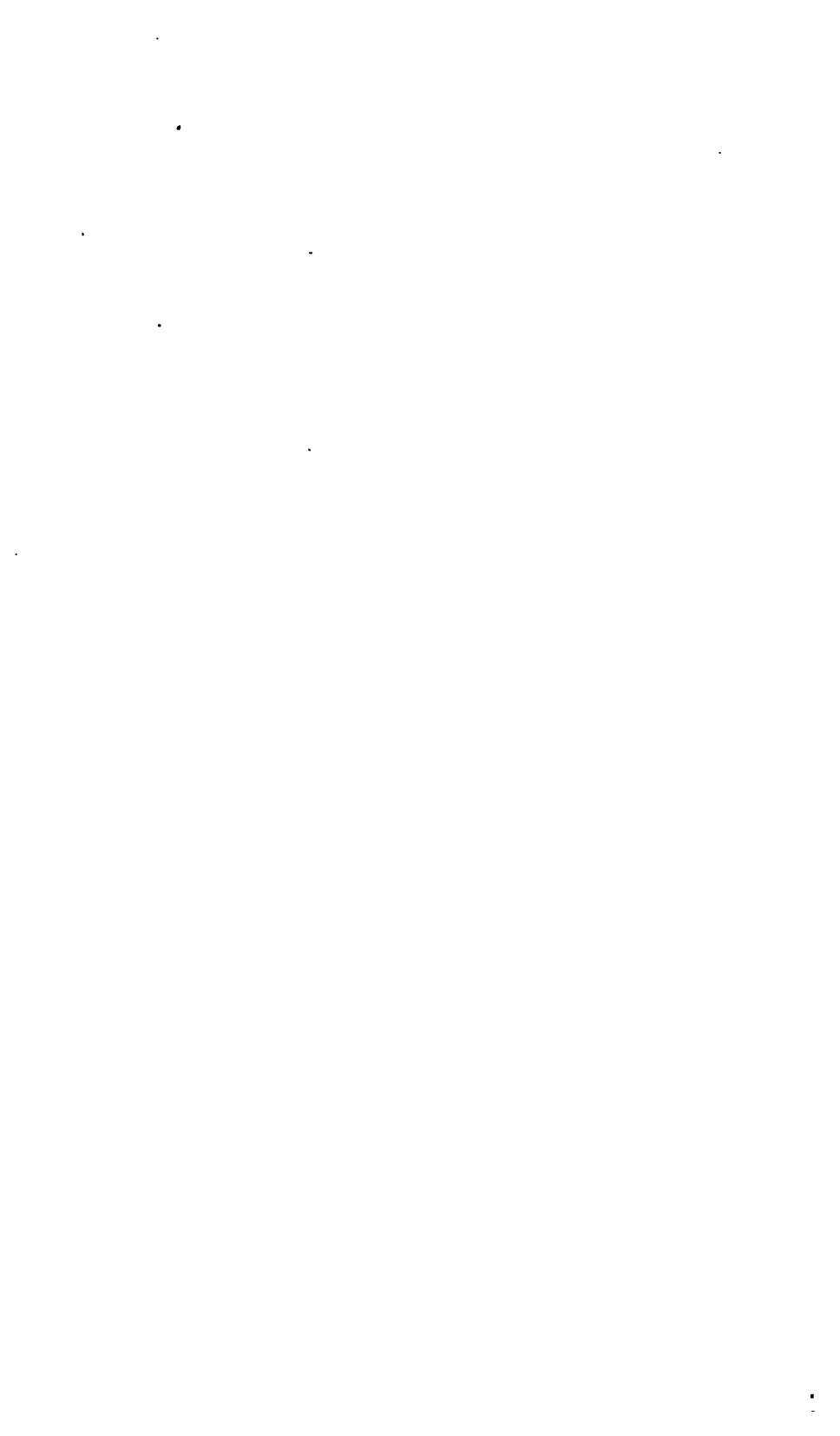
See CO-TENANCY; ESTATES.

WITNESSES.

1. **WITNESS WHO IS PURCHASING WHEAT WITH REFERENCE TO PARTICULAR MARKET**, is buying and selling in that market, and is kept informed as to the prices by circulars and correspondence, is competent to testify as to the value of wheat in that market. *Brackett v. Edgerton*, 211.
2. **OBJECTION TO INTERROGATORY AS "LEADING," BEING TO FORM AND MANNER** in which the question was put, should be made before the commissioner by whom the evidence is taken. *Smith v. Cooke*, 58.

3. WHERE FORMER DECLARATIONS OF WITNESS ARE OFFERED FOR PURPOSE OF IMPRACHMENT, the witness must be first asked whether he has ever made such declarations. *Id.*
4. WORDS "ORIGINAL OWNERS," IN PROSPECTUS of corporation to be formed, importing that no profits would be added to prices paid for their lands on account of any intermediate party between it and the precedent owners, and excluding the idea of purchase at speculative prices, are not terms of art, science, or trade, requiring the aid of experts to explain. *Simons v. Vulcan Oil and M. Co.*, 628.
5. REFUSAL TO STRIKE OUT EVIDENCE OF INTERESTED WITNESS is not error if the testimony was received without objection. Correction should be made through a request to charge the jury to disregard the evidence. *Id.*
6. FACT THAT WITNESS IS STOCKHOLDER in a company to which plaintiff is indebted does not render him incompetent. A creditor may be a witness for his debtor. *Id.*



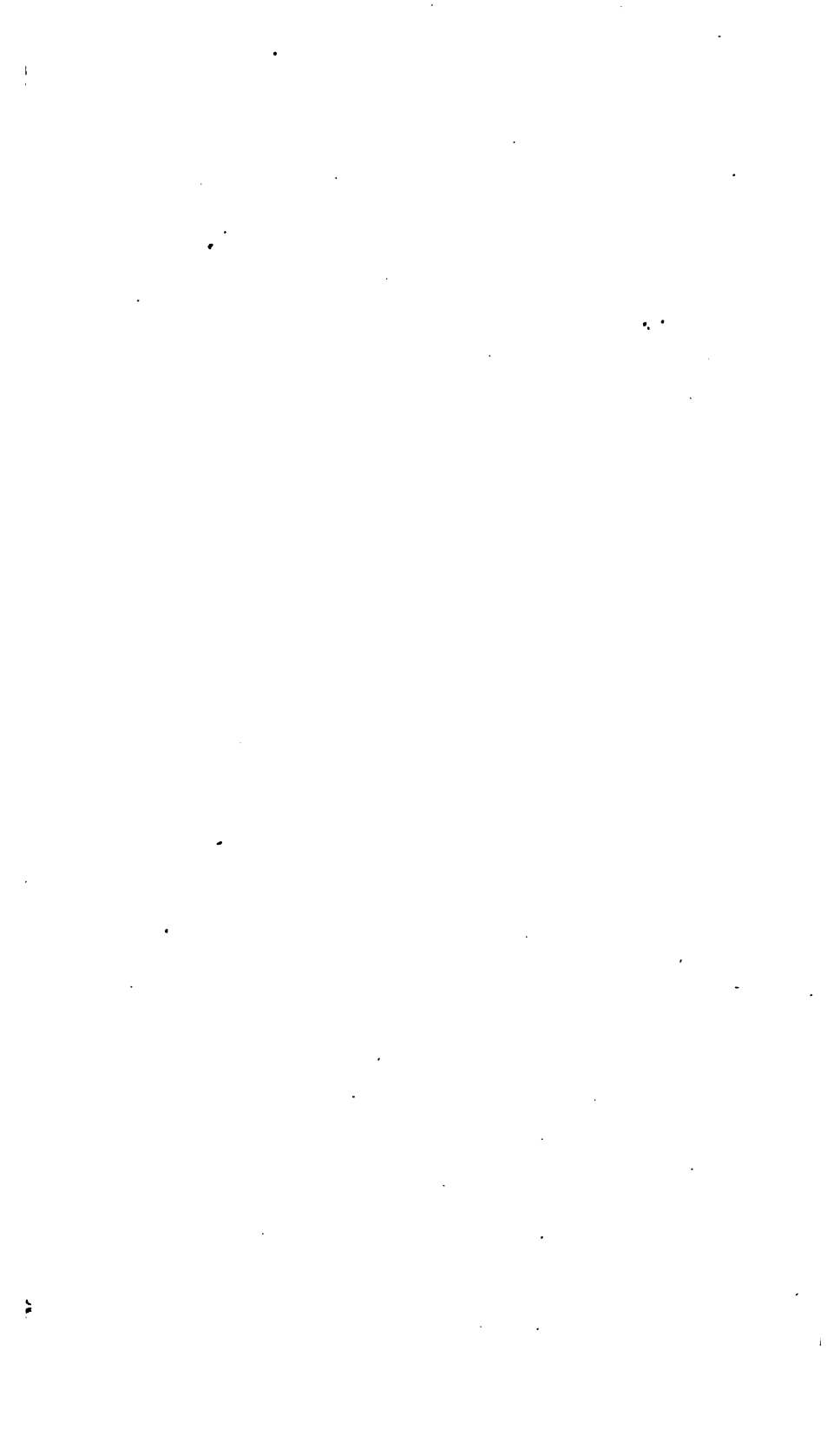








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